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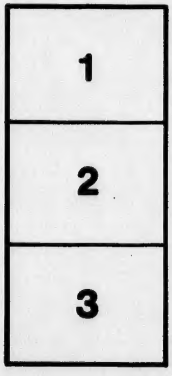
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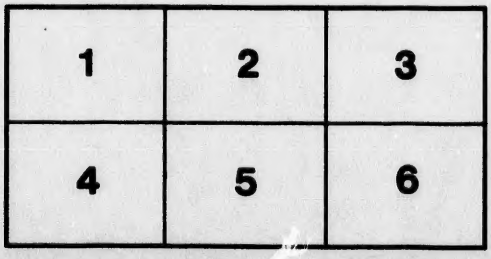
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TEXT BOOK

OF

MILITARY LAW,

For the use of the Gentlemen Cadets

OF THE

ROYAL MILITARY COLLEGE OF CANADA,

BY

MAJOR DOUGLAS JONES, R.A.,

Professor of Military History, Military Administration and Law.



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NOTICE TO SECOND EDITION.

The first edition was framed on the Army Discipline and Regulation Act, 1879, but the passing of the Army Act, 1881, and the issue of Rules of Procedure that same year necessitated a complete revision of the work.

This edition has been re-written and corrected in accordance with the Army Act, Rules of Procedure, and provisions bearing on the subject of Military Law contained in the Queen's Regulations, 1881.

A complete index has been added.

D. J.

KINGSTON, CANADA,
January, 1882.

ABBREVIATIONS USED.

Act (or A.A.)	Army Act, 1881.
A. W.	Articles of War.
C. in C.	Commander-in-Chief.
C. O.	Commanding Officer.
C. B.	Confinement to Barracks.
C. M.	Court or Courts Martial.
G. C. M.	General Court or Courts Martial.
D. C. M.	District " "
R. C. M.	Regimental " "
Field G. C. M.	Field General " "
S. C. M.	Summary " "
F. O.	Field Officer.
H. L.	Hard Labour.
H. M.	Her Majesty's.
J. A. G.	Judge Advocate General.
J. A	Judge Advocate.
M. A.	Mutiny Act.
N. C. O.	Non-Commissioned-Officer.
P. S.	Penal Servitude.
R. P.	Rules of Procedure, 1881.
R. W.	Royal Warrant for Pay, &c., 1881.
Q. R.	Queen's Regulations, 1881.
S. of S.	Secretary of State.
U. K.	United Kingdom.

(The figures in the margin refer to sections and paragraphs.)

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MILITARY LAW.

CHAPTER I.

CIVIL LAW, MILITARY LAW, AND MARTIAL LAW, CONTRASTED.

CIVIL LAW.

The laws of a civilized country, as applicable to every subject, are derived from two separate sources:

I. *Statute Law.*—Statute laws constitute the written code. For a law to become binding in England it must be passed by both Houses of Parliament and be approved by the Sovereign.

II. *Common Law.*—This is an unwritten code, common laws not being set down in any written Statute or Ordinance but depending merely upon immemorial usage and custom for their effect. It has been described as a "Judge made Law" derived from precedents formed by the decisions of celebrated Judges which are sure to be followed, and they become as binding as Statute Laws. The Judges however do not make the law but rather declare what it is, and their decisions are the authoritative evidence of the law.

Common Law has been altered and modified in many respects by Statute Law and is gradually being replaced by it.

The Civil Law of the realm is supreme, and is equally binding on all persons whether civil or military.

MILITARY LAW.

For the due maintenance of military discipline it has been found necessary to confer special powers on the Military Authorities.

As the essential strength of an army depends on the power and force of many men being absolutely subordinate to and at the disposal of the will of one, the first necessity in the existence of such a body is to ensure implicit obedience to the orders of superior authority and so to ingraft this quality into the constitution of the force that every member of it may, according to his position, be certain as by a second nature to fulfil the orders he may receive or to enforce those he may find it necessary to give.

Further, unless such a body is under strict rule and discipline it would not fail to become a terror and an oppressive burden upon the community among whom it is placed, for the force acquired by combination would place its members beyond the control of the ordinary civil power. The officers in command of the military force must, therefore, be charged with the duty of keeping it constantly in hand and must have effectual means of so controlling it that those composing it may always be made to respect the laws and customs of their civilian fellow-subjects and to comport themselves as peaceable, not turbulent, members of society.

The necessity for the existence of a distinct code of Military Law is stated by Lord Loughborough:* "The Army being established by the authority of the Legislature, it is an indispensable requisite that there should be order and discipline kept up in it, and that the persons

*Given in Clode's work on Military Law.

who compose the army, for all offences in their military capacity, should be subject to trial by their officers. That has induced the absolute necessity of a Mutiny Act. One object of that Act is to provide for the army, but there is a much greater cause for the existence of that Act, viz.: the preservation of the peace and safety of the Kingdom. The object, therefore, is to create a court invested with authority to try those who are part of the army, in all their different descriptions of officers and soldiers, limited to breaches of military duty."

Military Law has no regular permanent statute, and reference to precedent, such as Common Law, is by no means frequent. There exists, however, the Written Law, the Army Act, Articles of War (if any), and any Regulations issued by the Crown, and the Unwritten Law founded upon the established custom of the army and recognized in the former Articles of War under the term "Custom of War," which was analogous to Common Law. The Rules of Procedure now in force state: "In any case not provided for by these rules such course will be adopted as appears best calculated to do justice." In such a case decisions given by competent authority will be followed when possible; but the nature of military courts being temporary, and all records of proceedings being destroyed after a certain time, former precedents cannot always be followed, although members of courts would often have gladly availed themselves of precedents for their guidance if they could only have done so. Military courts are known by the name of "Courts Martial," the ordinary C. M. being termed general, district, and regimental. R. P. 131.

In the administration of Military Law all the principles of Civil Law are observed, but the technicalities of the latter are not adhered to.

The advantage of Military over Civil Law is that a Bill having to be submitted annually to Parliament to put the Army Act into force, any necessary amendments can be made, and thus the Act can be periodically corrected. From time to time these corrections can be em-

bodied in a new Act when all obsolete regulations are struck out. In Civil Law it often happens that only alterations in parts of certain ancient Acts are made from time to time, and so one Act gets, as it were, piled up on the top of another until there is great confusion.

Military Law consists of exceptional powers for dealing with offences which it might be dangerous or undesirable to leave to the ordinary course of justice. The action of Civil Law is too slow for Military purposes; moreover, that which may be perfectly harmless in the case of a civilian may, in the case of a soldier, constitute a serious offence against Military discipline. Disobedience of orders, drunkenness on duty, desertion, insubordination, etc., are purely Military crimes, and a special code is necessary for dealing with them.

"The duties devolving upon members of C. M. are of the most grave and important nature, and in order to discharge them with justice and propriety, it is incumbent upon all officers to apply themselves diligently to the acquirement of a competent knowledge of military law and the practice of C. M."

Q.R. VI. 81

MARTIAL LAW.

What is known as "Martial Law" consists also of exceptional powers for dealing with offences; but it is necessary to distinguish between Military Law and Martial Law.

Military Law has a distinct code, is regular in its application, and is administered by persons authorized to do so, and deals only with the land forces mentioned in the Army Act.

Martial Law has no code, is irregular in its application and, unless proclaimed by Parliament, is administered by persons who have either assumed the power to do so or who have received it without legal sanction. It affects all persons whether civil or military.

CHAPTER II.

HISTORICAL SUMMARY OF MILITARY LAW.

Before entering upon the consideration of Military Law as it at present exists, it will be instructive to consider briefly the causes of its origin and progress, as till the close of the 17th Century a distinct Military Code was unknown in England.

Before the days of standing armies troops in peace time were few, they were paid and kept by the Sovereign as his personal Guards and were liable to punishment like any other of his servants. When military forces were collected for expeditions or for suppressing rebellions, "Special Ordinances of War" were issued under the Royal Prerogative and applied by the C. in C. in the field, and these ceased when the army was disbanded.

The first record of a special code is to be found in a Statute of Richard II. (1377-99) which recognized a "Court of the Marshal" instituted to deal with military matters not cognizable by the common law. The power of the Marshal and of his deputies was absolute and summary, extending to the death penalty, and there was no appeal except to the Sovereign in person, though this was always objected to by Parliament.

The Army continued to be governed by Martial law in the reigns of James I. and Charles I. and the latter, in 1625, issued a commission to 25 military officers and civilians for the government of troops guilty of offences *Civil* and Military returned from Spain whom he ordered

not to be disbanded. "Articles of War" were issued for the government of the troops, and a Council of War or Marshal's Court was authorized to try soldiers and award punishments. Civilians were also tried by military commissions which were established in different parts of the country. These commissions exercised their authority so freely that their legality was challenged on the ground that in time of peace the Civil Magistrate had cognizance of all offences, and that the civil population at least were not subject to military law.

The Common Law of England, having sprung up in an age when all men bore arms occasionally and none constantly, recognized no distinction in time of peace between a soldier and any other subject, consequently Parliament objected to soldiers being withdrawn from the protection or penalties of civil laws, or to civilians being tried and punished by the military which gave rise to extortion and oppression. This led, in 1628, to the famous "Petition of Right" by which soldiers were not to be withdrawn from the protection of civil law, nor from its punishments. This Bill of Rights made no distinction between civil and military and declared the military commissions illegal, so that it practically took away the Commander's power of enforcing discipline as soldiers had now to be treated as civil criminals.

Up till that time the army had been governed by courts acting under the prerogative of the Crown which declared what offences should be punishable, as well as the powers of punishment, and as there was no appeal to civil courts an absolute despotism had been set up. Thenceforward, however, these Commissions were clearly illegal and the army was left without any sufficient legal government at all.

When therefore Charles I. by illegal means raised, armed, and paid an army to act against the Scots in 1638 he had to provide for its government and was consequently forced to take the further illegal step of issuing a Commission to the Commander-in-Chief and others to

punish offenders against military discipline. Laws and ordinances specifying certain punishments were in consequence put forward in 1639 which the army had to obey.

This Royal Army was disbanded in 1641, and when in 1642 Parliament undertook to raise an army itself, the Earl of Essex, its Commander-in-Chief, obtained the sanction of both Houses of Parliament to "Articles of War" which he put forth that year. These articles agreed almost entirely, so far as the discipline of the army was concerned, with those issued for the Royal Army in 1639. In order to cover any omissions in the code it wound up with a general clause for punishing "according to the ancient order of marshall discipline" offences "for which no special order is set down." This clause was long known under the name of the "Devil's Article," and it still exists only in another form in section 40 of the Army Act.

The civil wars in England brought numbers into the profession of arms, and at the restoration of Charles II. the army then existing had been raised by the Commonwealth.

The Parliament of the Restoration (1660) permitted Charles II. to retain, at his own cost, and govern by his own regulations, a body of soldiers 8,000 strong designated "His Majesty's Guards and Garrisons," and ultimately forming the "Standing Army," but no sanction was given the Military Law. Parliament feared that if it legislated for these troops the country would have to pay for their maintenance, and consequently the King was left to govern them under his Royal Prerogative. He therefore issued a code of laws and ordinances of war in 1662 containing 23 articles relative to the mustering and payment of soldiers, and defining certain offences. By these authority was given to the General Commanding to constitute C. M. in peace. If the offence was punishable with death the prisoner was to be tried according to the known laws of the land, if the offence was not so punishable then the trial was to take place by special Royal Commission under the Great Seal.

In the time of Charles II. the discipline of the Militia, the recognized constitutional force, was committed to the Lord Lieutenant and his deputies, and offenders were punished by the civil magistrate.

Occasion for further "Orders and Articles of War" arose on the declaration of war by France in 1666, and again in anticipation of war in 1672. These articles were framed after the code of 1642; they were intended only for service abroad. The articles of 1672, known as Prince Rupert's code, more than any other have formed the model on which the present military code and system of military judicature have been framed, and they were also adopted in the United States in 1775.

Under these and the preceding articles of war, soldiers were exempt from punishment by the civil magistrate except for high treason or killing and robbing civilians.

All this took place under the authority of the Crown with the exception of Lord Essex' code for a parliamentary army which had the sanction of Parliament.

In 1688 came the Revolution which deposed James II. and placed William, Prince of Orange, on the throne; but this change was not universally acquiesced in by the soldiers serving in the army. After the abdication of James II., when some Scotch regiments were ordered by William III. to embark for Holland, they refused to do so and marched off to their homes in the north saying that James was their King. No constitutional law existed by which the mutinous troops could be punished, as hitherto soldiers in the eye of the law had been regarded only as citizens and amenable only to the civil tribunals.

The very existence of a standing army had always been a great subject of controversy in Parliament and this, added to the extreme jealousy of any interference with civil law, were great hindrances to the introduction of a distinct code of military law. Yet the necessity of having such a code was now apparent and, in 1689, Parliament passed the first "Mutiny Act," which stated that "standing armies and courts martial were unknown in England;

but, in consideration of the perils of the time, no man mustered or in pay of the crown should desert or mutiny on pain of death."

The preamble (or introduction) also stated that though the raising or keeping a standing army within the realm in time of peace, unless with the consent of Parliament, was against law, and that though no man might be subjected to any kind of punishment except after a fair trial of his Peers, still, the necessity being urgent, "any man who shall stir up mutiny, or desert the service, shall be brought to a more exemplary and speedy punishment than the usual forms of law allow."

This Act was more severe than the former Prerogative Code in that it added to the number of offences punishable with death; but while giving to the King the necessary power to punish offences against discipline committed by soldiers, it was resolved to guard against his employing the soldiers to overturn the Government, and the Act settled a point which had always been a subject of contention with the Crown by declaring that no officer or soldier should be exempt from the ordinary process of law.

Mutiny, sedition, and desertion were the only offences legislated for in this Act, they were to be punishable with death though any other punishment might be inflicted, and minor offences were left to be dealt with as before under the King's authority. This M. A. authorized the convening of C. M. by warrant from the Crown or General in command. The members of the Court were to be sworn and take evidence on oath. It was to be composed of thirteen officers none under the rank of Captain, and a majority of two-thirds of the Court had to concur in any sentence of death.

Henceforward Parliament decided to pay for the military force out of the public revenues and forbade the Sovereign to maintain any other. Consequently, since the establishment of the army was now sanctioned, its pay provided, and its discipline enforced by Parliament, it became National rather than Royal.

It was expressly stated that the M. A. did not apply to the Militia, but only to the standing army within the Kingdom. The duration of this Act was limited to six months, but it was at the end of that time renewed and, with but few intermissions, it was passed annually ever since up to 1879.

This Act then created the first *statutory* tribunal for the punishment of military sedition and desertion, and it legalized capital punishment within the U. K. for those crimes.

Although at the time of the passing of this first Mutiny Act Articles of War were in existence, no notice was taken of them; the inference therefore is that Parliament did not intend to abridge the authority of the Crown but rather to strengthen it by permitting the Crown to supplement the M. A. by Articles of War. Hence other C. M., not under the statute but under the prerogative of the Crown, were still held for the trial of all minor offences; and abroad the army continued to be governed wholly and solely by the A. W. and the minor courts which were called the Court of the General, and the Court of the Colonel.

There was thus a sort of dual code:

1st. Statutory Courts, to try offences enumerated in the M. A.

2nd. Prerogative Courts to try all other offences.

When a Statutory Court was assembled the warrant, issued for the purpose, distinctly mentioned the statute. Gradually, however, the two merged into one owing to the King's going to Holland when, instead of issuing a specific warrant for each C. M., he issued, before going abroad, general warrants to try military offences according to the M. A. and also according to the A. W. (or under the prerogative); thus a fusion of the two codes took place.

After the passing of the first M. A. additional sections were from time to time inserted as it appeared desirable to embody in the statute what had hitherto only appeared in the A. W.

The following are some of the principal alterations made in the M. A. from time to time.

In 1695, during the reign of William III., its provisions were extended to Ireland.

The Act of 1713, after the peace of Utrecht, during Queen Ann's reign, was the first ever passed for the government of the army in time of peace. The purpose for which a standing army was kept was defined: As a guard to Her Majesty "and for the safety of the Kingdom." The numbers were limited to 8,000 at home, still any number abroad. This same Act gave power to the Crown to make Articles of War for the government of troops beyond seas prescribing punishments for various offences. This was the first M. A., which acknowledged the right of the Crown to maintain soldiers out of England in time of peace, though in 1700 Marlborough, commanding in Holland, had been authorized to make "rules and ordinances for the government of the army" serving abroad, a power till then held solely by the Crown.

The M. A. of 1713 withdrew the power of capital punishment altogether from the Code, and it authorized corporal punishment for certain offences but placed no limitation on the punishment to be inflicted for any crime, except that it should "not extend to life or limb."

In 1714 a clause was introduced giving express authority to the Crown to make A. W. for the better government of the forces at home.

The limitation prescribed in the Act of 1713 as to the non-infliction of capital punishment was said to have been the cause of the Rebellion of 1715, so far as that it prevented the suppression by military tribunals of the action of the army in favour of the Pretender in that year; and in consequence, in 1716, it was enacted that the King (George I.) might establish A. W. and constitute C. M. for the government of the Army in the U. K. as well as beyond seas, with power to try *any* crime or offence, and to inflict *any* penalties. This Act then went as far in severity as that of 1713 did in mildness; for it retained

the peculiarity of making any offence, whether large or small, punishable with equal severity and it withdrew the limitation that such punishment should not affect "life or limb" and it thus authorized capital punishment for the smallest offence.

This excessive harshness was made still more crushing by the unlimited power given to the Crown to declare new offences by A. W., and also making it a capital offence to disobey the orders of a superior officer. Corporal punishment became the ordinary punishment for desertion in the reign of George I., as that King would seldom sanction capital punishment for this offence.

In 1749 this unlimited authority, which had formed the subject of great parliamentary controversy, was restricted by a provision in the M. A., that within Great Britain and Ireland no person should be liable to any punishment extending to life or limb except for crimes expressly specified in the Act itself; and capital punishment for disobedience of orders was limited by inserting the word "lawful" as qualifying the word "order" or "command."

The military codes of the time of George I. infringed somewhat on the principle of the superiority of the civil law by empowering C. M. to try persons subject to the M. A. for certain civil offences, and for offences against civilians; but this power was entirely withdrawn in 1721, though exception was made and still continues in respect to offences committed at stations where no civil judicature is in force.

The Mutiny Act at first applied solely to the Regular Army, but from time to time other military bodies—Volunteers, Invalids, etc.—were made subject to it; and finally in 1756, the militia, which till then were under the local magistracy, were made subject to the M. A. when under arms.

Until 1756 the Marines were governed when on board ship under the Naval Discipline Act, and when on land under the army M. A.; but separate Marine M. A. and A. W., substantially the same as those for the army, were from that time annually passed by Parliament until 1879

when the Marines were again subject when on land to the same Act as the other land forces, namely, to the Army Discipline and Regulation Act.

In 1788, when it was determined to convert the Royal Military Artificers into a military body under the title of Royal Sappers and Miners, great opposition was made in Parliament against what was said to be the unconstitutional practice of extending the M. A. to civilians; but in 1809 the Commissariat and subsequently other civil branches of the army were brought under the Act.

In 1794 it was first ordered that A. W. were to be judicially taken notice of, as Judges ignored them up to that time.

As regards punishments, not to go further back than the year 1717, the punishments then authorized by the M. A. and A. W. were death, cashiering, imprisonment, loss of pay, and corporal punishment, and the C. O. had summary power of inflicting the last. When several soldiers had been condemned to be shot they were sometimes allowed to draw lots for one only to suffer. William III. so paraded two out of three in 1696, and the Duke of Wellington made some draw lots in the Peninsular. He also gave some men the choice of execution or corporal punishment. In 1803 transportation was made a military punishment; but the staple form of punishment in the British Army, at the end of the last century and beginning of the present, was undoubtedly flogging, and at that period there seems to have been no limit to the number of lashes that might be inflicted as we read of no less than 1,900 lashes having been awarded a soldier by sentence of a C. M. in India, a punishment which Sir Edward Paget reduced to 1,250.

But public attention having been directed to the matter, an order was issued in 1812 limiting the number of lashes which could be inflicted by a regimental general (corresponding to the present district) C. M. to 500; a R. C. M. was restricted to 300. In 1832 this number was reduced to 200; and in 1833 it was limited to certain offences.

The principle that imprisonment might be inflicted as an alternative for corporal punishment was adopted by Parliament in 1812.

The number of lashes to be inflicted were reduced from time to time, until for a considerable period corporal punishment was restricted to 50 lashes.

In 1868 corporal punishment was abolished altogether in time of peace.

Drunkenness.—Within the last fifty years several attempts have been made to repress this crime in the army.

In 1830 was introduced the system of charging men before C. M. with the crime of "habitual drunkenness;" for this a man must have been drunk four times within twelve months, or twice within the same period when on duty or warned for duty, or on the line of march.

This plan was continued till 1869, and C. M. were constantly assembled for the trial of offenders guilty of drunkenness, but in 1869 C. O.'s were authorized to punish summarily by fine simple acts of drunkenness, and trial by C. M. for habitual drunkenness was done away with.

The Army Discipline Act of 1879 re-introduced the crime of "habitual drunkenness," and defined an habitual drunkard as one who "has been guilty of drunkenness on not less than four occasions in the preceding twelve months."

The Army Act of 1881 has again done away with the crime of "habitual drunkenness" but has introduced a fresh offence, termed "an aggravated offence of drunken-
A.A. 44 (7) ness," and defines it as "drunkenness committed on the march or otherwise on duty, or after the offender was warned for duty, or when by reason of the drunkenness the offender was found unfit for duty."

Army Discipline Act.—For some years, prior to the year 1879, on passing the Annual Mutiny Bill promises were made from time to time in Parliament that the existing codes of military law should be amended and classified.

This led to the introduction of a Bill in 1879 for the purpose of passing "The Army Discipline and Regulation Act, 1879," which was a consolidation of the Mutiny and Marine M. A., the Articles of War issued in pursuance of these Acts, and the Army Enlistment Act, 1870. This Act restricted the infliction of corporal punishment to active service and only for such offences as were punishable by death, and it was limited to 25 lashes as a maximum.

This Discipline Act was to be put in force by a Bill submitted annually to Parliament, and the "Army Discipline and Regulation (Annual) Act, 1881," abolished corporal punishment altogether, and empowered the Secretary of State to frame rules for the infliction of "summary punishment" other than flogging.

Army Act.—Later in the same year the "Army Act 1881" was enacted in order to consolidate the Army Discipline and Regulation Act, 1879, and the subsequent acts amending the same. This is the Act now in force.

The "*Regulation of the Forces Act*, 1881," which became law at the same time, provides for various amendments in military law (embodied in and repealed by the Army Act, 1881,) and further amends the legal position of the Reserve and Auxiliary Forces.

CHAPTER III.

THE "ARMY ACT, 1881."

This Act makes it lawful for Her Majesty to make
A. A. 69. A. W. which "shall be judicially taken notice of by all judges and in all courts whatsoever: Provided that no person shall, by such A. W., be subject to suffer any punishment extending to life or limb, or to be kept in P. S., except for crimes which are by this Act expressly made liable to such punishment," and further that no person is "to be punished in any manner which does not accord with the provisions of this Act." The incorporation in the Act itself of the old A. W. will probably render the exercise of this power unnecessary or very rare.

The Act also empowers Her Majesty to make "Rules of
A. A. 70. Procedure" for the assembly, procedure, convening, constitution, execution of sentences, etc., of C. M., also of Courts of Inquiry, provided they are not inconsistent with the provisions of the Act. These Rules are to be "judici-
R.P.134 (D) ally noticed" and to be laid before Parliament as soon as practicable.

A Secretary of State is also empowered to make rules
A.A. 44 (5) from time to time for the "Summary Punishment" of soldiers on *active service* found guilty by C. M. of certain offences. Such summary punishment, other than flogging, "shall be of the character of personal restraint or of hard labour, but shall not be of a nature to cause injury to life or limb, and shall not be inflicted where the confirming

officer is of opinion that imprisonment can with due regard to the public service be carried into execution."

Thus Parliament has entrusted enormous powers to the Secretary of State for War, powers which hitherto it had always jealously kept in its own hands; but it is directed that all such rules are to be laid before Parliament as soon as practicable.

It may be mentioned here that the Army Act being a regular Act of Parliament, passed by both Houses and approved by the Sovereign, is binding on civilians as well as soldiers on such points as are therein especially declared to be applicable to the former.

Articles of War, on the other hand, should any be issued, are binding on soldiers only. They are ordinances framed by the Sovereign under the authority of the Army Act. They are *permanent* and remain in force till altered by order of the Sovereign.

Consequently all regulations in which civilians are at all involved, such as the apprehension of deserters, compulsory attendance of civilian witnesses at C. M., recruiting, billets, etc., must be provided for in the Army Act.

The "Preliminary" part of the Act consists of three sections:

The 1st gives the short title—"Army Act, 1881." A.A. 1.

The 2nd prescribes the duration of the Act that "this Act shall continue in force only for such time and subject to such provisions as may be specified in an *annual* Act of Parliament bringing into force or continuing the same." A.A. 2.

The 3d divides the Act into five parts relating to the following matters: A.A. 3.

Part I., discipline (Secs. 4-75.)

Part II., enlistment (Secs. 76-101.)

Part III., billeting and impressment of carriages (Secs. 102-121.)

Part IV., general provisions (Secs. 122-174.)

Part V., application of military law, saving provisions, and definitions (Secs. 175-190.)

Part II. of the Act relating to enlistment, deals with the terms of enlistment, reckoning of service, appointment to corps and transfers, re-engagement, discharge, offences relating to enlistment, etc. It alters to some extent the conditions of enlistment, service and discharge, and therefore it applies as respects reckoning of service, forfeiture of service, and liability to be detained in the service, and liability to transfer, etc., only to soldiers enlisted or re-engaged after the passing of the Act, and not to soldiers previously enlisted or re-engaged except with their own consent. These soldiers, in the absence of consent, remain, as regards the above matters, in their previous position, but if they re-engage they are re-engaged under the Act.

The subject of enlistment is dealt with in the course of "Military Administration" and is therefore omitted here.

Part III. of the Act deals with the rules relating to the billeting of officers and soldiers on the line of march, and to the impressment of carriages, and lays down certain penalties for the non-observance of these rules.

Before marching a "route" is issued to the Officer Commanding the troops about to move, and on production of this route constables have to supply billets for officers, men and horses in inns, hotels, livery stables, etc., the keepers of which are by law bound to accommodate them, furnishing lodging and attendance to officers and food in addition for soldiers, and forage for horses, for which they are paid a fixed price.

Also on production of the "route" a Justice of the Peace on demand of the Commanding Officer issues a warrant authorizing constables to provide the necessary transport, for which a regulated sum is paid.

It is not considered necessary to enter further into the regulations relating to these subjects as they are only applicable on the line of march, and besides the provisions are somewhat complicated. Officers before proceeding on a march should provide themselves with a copy of the Act.

The second and third schedules attached to the Act give some further regulations relating to these subjects.

A Part VI. is added to the Act (Secs. 191-193). It deals with the "Commencement and application of Act and Repeal." It fixes the date on which the Act is to come into force, then specifies the soldiers who are subject to it as regards their service, having regard to the time of their enlistment, and finally repeals certain Acts specified.

The "Army Act," as mentioned above, is only brought into force by an annual Act of Parliament.

This "Annual Act" commences by quoting the preambles of the old M. A. and Marine M. A. These preambles set forth the reason for legislation being necessary and the object of it. The wording of the first assertion is taken word for word from the "Bill of Right" on the acceptance of the Crown by William III. in 1688. "Whereas the raising or keeping a standing army within the U. K. of Great Britain and Ireland in time of peace, unless it be with the consent of Parliament, is against law."

It then asserts the purposes for keeping a standing army: At first it ran, "for the safety of the Kingdom, Protestant religion, reduction of Ireland." Now it runs as follows: "And whereas it is adjudged necessary by Her Majesty, and this present Parliament, that a body of forces should be continued for the safety of the U. K., and the defence of the possessions of Her Majesty's Crown."

It then states the numbers the army is to consist of for the military year (April to April), including forces in the Colonies, and the depôts of corps in India, but exclusive of the numbers actually serving in India.

The preamble of the Marine M. A. then follows stating the occasional liability of the Royal Marine Forces to the Act, viz: while on shore, or on board any ships other than those belonging to the Royal Navy.

The next paragraph of the preamble then defines the object of the Act, as follows: "Whereas no man can be fore-judged of life or limb, or subjected *in time of peace* to any kind of punishment *within this realm* by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm." Nevertheless, the preamble proceeds, it is requisite for retaining the forces in their duty that an exact discipline be observed, and that those who mutiny, or stir up sedition, or desert, or are guilty of offences to the prejudice of good order and military discipline, "be brought to a more exemplary and speedy punishment than the usual forms of the law will allow;" that is, they are to be tried by Military Courts.

It is to be noted that the limitations "within this realm," and "in time of peace," have an important bearing on the prerogative of the Crown for putting in force Martial Law.

The Annual Act then gives the dates on which the Act will expire at different stations.

The enactments then follow.

1. The first section states the name of the Act.

2. The second, the period during which the "Army Act" is to remain further in force, namely for another calendar year from the dates specified below. It is then stated that all persons subject to Military Law whether within or without H. M's dominions are subject to the Act, and also that any such person is not exempted from its provisions even though the number of the forces is either greater or less than the number specified in the preamble.

3. The third section, with schedule, gives the prices to be paid for billeting.

Then if any alterations are to be made in the Act additional sections are added. For instance, in the "Army Discipline and Regulation (Annual) Act, 1881" four additional sections were added amending the Act of 1879 by abolishing flogging and providing for the

infliction of summary punishment in lieu of flogging. It also instituted a new description of C. M. on active service—termed Summary C. M.

Hence in the Annual Bill bringing the Army Act into force any necessary amendments can be made, and these when they attain any number can from time to time be embodied in a revised Army Act by means of a "Consolidation Bill."

The duration of the Act is for one calendar year, the year commencing at different places on different dates to enable the new Annual Act to be conveyed to distant stations. The dates on which it is to come into force are specified, a wide margin being left in case of accidents. But the new Act may come into force sooner, from the date of its receipt and *publication in orders*, and last till the expiration of the calendar year counting from the date specified in the Act. Any one Annual Act may thus be in force for more than one year, but the date of its expiration is absolute.

Penal legislature is never retrospective For instance, should some provisions of a new Annual Act be more severe and allow of a heavier punishment being inflicted for any crime than the previous one, a prisoner should not be tried by the new Act if he committed a crime while the old one was in force, though it would not be strictly illegal to do so.

The Act expires after the following dates of each year:

In the U. K., Channel Islands, and the Isle of Man, after the 30th April.

Elsewhere in Europe, inclusive of Malta, also in the West Indies and America, after the 31st July.

Elsewhere, whether within or without H. M. dominions, after the 31st December.

Such being the constitutional principles of the Act, the question arises: what would be the effect on the army if Parliament refused to pass the Act, as its assent is essential to the maintenance of an army? Practically the con-

sent of Parliament is given before the Bill is brought up by passing the vote in supplies, and the numbers estimated for in this vote are always copied in the preamble. Clode* says that, should such an accident occur, the army would be paid but discipline would have to be maintained as best it could under the Royal Prerogative (by issuing A. W.) as before the existence of a M. A., and that the army would not be disbanded. This is in accordance with facts, for in the reign of William III. the M. A. lapsed and discipline was carried on by Royal Prerogative. Should Parliament however refuse the vote in Supply no army could be maintained.

DEFINITION OF CERTAIN EXPRESSIONS USED IN THE ACT.

A.A.189 (1) The expression "on active service" is used when a force is engaged in operations against an enemy, or in a country wholly or partly occupied by an enemy, or is in military occupation of any foreign country.

(3) In case of the imminence of active service or of the recent existence of active service, the Governor of a Colony, or the C. in C. of forces serving out of H. M. dominions, may declare by publication in general orders that a state of "active service" exists.

A.A.190 (1) "C. in C." means the Field Marshal or other officer Commanding-in-Chief H. M. forces.

(4) "Officer" means an officer commissioned or in pay as an officer in H. M. forces; it also includes departmental officers, retired officers legally entitled to the style and rank, and warrant officers holding honorary commissions.

R.P. 128. "Commanding Officer," as used in the sections of the
Q.R. VI. 12 Act relating to "Courts Martial," to the "Execution of Sentence" and to the "Power of Commanding Officer" [*i. e.*, sections 45, 46, 47, 59, 64, 65, 66, 138, 181 (5), 182, 183 and 184] applies to the officer who has to deal with charges against offenders, that is, to dispose of them on his own authority or refer them to a superior authority.

*Late Legal Secretary to the War Office.

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In other sections of the Act the expression "C. O." is not restricted to this definition, but means an officer in the chain of command which extends from the highest military authority downwards.

"N. C. O." includes an acting N. C. O., a Warrant Officer not holding an honorary commission, and an army schoolmaster when not a warrant officer. A.A. 190(5)

The position of a warrant officer is thus defined in the Queen's Regulations:—They are senior to all other N.C. O.'s. They will supply the place of subaltern officers when required, but they will not sit as members of Courts of Inquiry or on Regimental Boards. They may become honorary members of sergeants' messes. On parade they take post as officers, but never salute. N. C. O.'s and men will address warrant officers in the same manner as they do officers, but will not salute them. Q.R. VII. 69–70

"Soldier" in the Act does not include an officer, but, with certain modifications, it does include a warrant officer not holding an honorary commission, a N. C. O., and every person subject to military law during the time he is so subject (men of the auxiliary forces, etc.) A.A. 190 (6)

The expression "every person subject to Military law" is one used throughout the Act for the purpose of including persons other than officers and soldiers, such as camp followers, sutlers, etc., who are subject to military law.

"Superior officer" when used in relation to a soldier includes a warrant officer and a N. C. O. (7)

"Regular Forces" mean officers and soldiers who by their commissions or terms of enlistment are liable to render continuous service in any part of the world, including the Regular Army and with certain modifications the Royal Marines, Indian forces, and Reserve Forces when subject to military law. (8)

"Reserve forces" mean the Army Reserve and the Militia Reserve force. (9)

"Auxiliary forces" mean the militia, yeomanry, and volunteers. (10)

(18) "Military decoration" means any medal, clasp, good-conduct badge, or decoration.

(19) "Military reward" means any gratuity or annuity for long service or good conduct; and includes any good conduct pay or pension or any other military pecuniary reward.

(20) "Enemy" includes all armed mutineers, armed rebels, armed rioters and pirates.

(25) "Beyond the seas" means out of the United Kingdom, Channel Islands, and Isle of man.

(28) "Oath" and "swear" include affirmation or declaration in cases where the latter are by law allowed instead of an oath.

"Month" means a calendar month.

"Year" means twelve calendar months, and may be held to commence on any day in any month.

PERSONS SUBJECT TO MILITARY LAW.

All persons subject to Military Law are so subject either as officers or as soldiers.

I.—PERSONS SUBJECT AS OFFICERS.

A.A. 175. (1.) Officers of the regular forces on full pay, officers of the staff, and all who are employed on military service under the orders of regular officers.

(2.) Officers of the permanent staffs of any of the auxiliary forces.

(3.) Officers of the militia.

(4.) Persons serving in the position of officers with any troops, outside the U. K. or India, under the command of a regular officer.

(This does not apply to colonial forces.)

(5.) Officers of yeomanry and volunteers, when in actual command of men subject to military law; or when their corps is on actual military service.

(6.) The same when, with their own consent, they are doing duty with any body of troops subject to military

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law, or when ordered on duty by the military authorities.

(7.) Persons who are allowed by the Secretary of State or Governor-General in India to accompany, in the capacity of officers, H. M. troops on active service beyond the seas.

(8.) Persons accompanying a force on active service, and holding from the officer commanding the force a pass entitling them to be treated as officers.

II.—PERSONS SUBJECT AS SOLDIERS.

A.A. 176.

(1.) Soldiers of the Regular forces.

(2.) N. C. O.'s and men of the permanent staff of the auxiliary forces.

(3.) N. C. O.'s and men of a force raised by order of H. M. outside the U. K. and India, and serving under the command of an officer of the regular forces.

(4.) Pensioners employed in military service under an officer of the regular forces.

(5.) N. C. O.'s and men of the Army and Militia Reserve when:—

(*a.*) Out for training.

(*b.*) Called out for duty in aid of the civil power.

(*c.*) Called out on permanent service under H. M.'s proclamation.

(6.) N. C. O.'s and men of the Militia. :—

(*a.*) During preliminary training.

(*b.*) During training or exercise either alone or with regulars.

(*c.*) When attached to or acting with regulars.

(*d.*) When embodied.

(7.) N. C. O.'s and men of Yeomanry, when:—

(*a.*) Being trained alone or with regulars, or with militia when subject to military law.

(*b.*) Attached to or acting with regulars.

(*c.*) On actual military service.

(*d.*) Serving in aid of the civil power.

(8.) N. C. O.'s and men of Volunteers when:—

(*a.*) Being trained with any regulars, or with militia when subject to militiary law.

(*b.*) Attached to or acting with regulars.

(*c.*) On actual military service.

But the C. O. of any volunteer force, when he knows that the N. C. O.'s and men under him are about to enter upon any service which will subject them to military law, must provide for their being informed that they will be so subject, so that they may be afforded an opportunity of abstaining from entering on that service.

(9.) Persons in the service of H. M. troops when on active service beyond the seas.

(10.) Persons who are followers of or who accompany H. M. troops on active service beyond the seas.

A.A. 177. So far as the laws of India or a Colony has not provided for the government and discipline of local forces, such forces when serving with regulars come under the provisions of the Act.

A.A. 179. The Royal Marines, when borne on the books of one of H. M. ships are subject to the Naval Discipline Act like officers and men of the Royal Navy. If any such officers or men of the Royal Marines are employed on land the senior naval officer present may order that they shall be subject to military law.

Marines can only be tried by G. C. M. convened by an officer holding a warrant from the Admiralty, except when serving beyond the seas with other regular forces and there be no such officer present, when a G. C. M. may be assembled by an officer authorized to convene such a court. A D. C. M. to try a Marine may be convened by any officer holding a warrant to convene D. C. M.

A.A. 180. Officers, soldiers, etc., of H. M.'s Indian forces, being natives of India, are only liable to Indian military law.

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CHAPTER IV.

DISCIPLINE.

For the maintenance of discipline in the army, C. O's of regiments and battalions are given certain powers for the summary punishment of minor offences, but for graver offences military tribunals, termed Courts-Martial, are authorized by the Act. These military tribunals are analogous in their jurisdiction to petty sessions, quarter sessions, and the higher Courts of Civil Law. The scope of Military Law is, however, generally restricted to the correction of offences against discipline committed by officers and soldiers, though ordinary offences against Civil Law, except treason, murder, manslaughter, treason-felony, or rape, are frequently dealt with by C. M.

It cannot however, be too clearly pointed out that in no case is military law ever to interfere with civil law when the latter is being regularly administered. Persons subject to military law who commit offences against civil law are to be proceeded against as civilians in the ordinary courts of Justice. But some offences recognized by civil law are specially named in the Act and are also punishable by military law,—such as sedition, assault, theft, damage to property of civilians, offences against rules of enlistment and billeting, etc. Section 39 of the Act specially provides for the punishment of all persons subject to military law who interfere with the operation of civil law. A.A. 39.

The Sovereign is primarily entrusted with the command of the army and with power to enforce discipline. This power is delegated, in the first instance, by the Sovereign to the C. in C., and through him to General and other officers having command under him.

General officers commanding districts or stations have ordinarily entire responsibility and authority over all troops serving for the time under their command. This authority is not required to interfere with the immediate command of regiments or battalions, as officers commanding battalions and corps have not only power to punish summarily all ordinary offences, but they are also empowered to summon R. C. M. when necessary.

Thus minor offences are to be punished in the battalion or corps, graver ones by authority of the General commanding the district (to whom is given authority to assemble and confirm the decisions of D. C. M. and sometimes also of G. C. M.), and the most serious crimes by supreme authority of the C. in C., or Her Majesty.

MAINTENANCE OF DISCIPLINE IN A BATTALION OR CORPS.

Every C. O. is required to keep order in his command and to the utmost of his power prevent disorder,
Q.R. VI. 5. for which all officers are required to aid and support him to the utmost of their power.

Q.R. VI. 1. The absence of crime and not its screened existence is the criterion of a well established discipline.

Q.R. VI. 4. Officers should not reprove N. C. O's in the hearing of privates lest their authority should be weakened and their self respect lessened, unless it is necessary that the reproof be public for the sake of example.

Q.R. VI. 7. Deliberations or discussions having the object of conveying praise or censure, etc., towards superiors are strictly prohibited
Q.R. VI. 8. as being subversive of discipline, as well as the presenting of presents or testimonials.

Q.R. VI. 9. No meetings, demonstrations, or processions, for party or political purposes may be taken part in.

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No information relating to the number, movements, or operations of troops may be published; nor may publicity be given to individual opinions in any manner tending to prejudge questions that may at the time be undergoing official investigation by the military authorities. Q.R. VI.10

Anonymous complaints, and the publication through the medium of the press of anything calculated to act injuriously on the interests of the service, or to excite discontent in the army, are strictly prohibited. Q.R. VI.11

COURSE OF PROCEDURE ON COMMISSION OF OFFENCES.

ARREST AND CONFINEMENT.

Every person subject to military law charged with an offence punishable under the Act may be taken into military custody. A.A. 45 (1)

Military custody (not under sentence) means the putting the offender under arrest or in confinement. (2)

Officers and N. C. O.'s are usually placed under arrest but, if circumstances require it, they may be placed under charge of a guard, picket, sentry, or provost marshal, etc. When attending a C. M. for trial they are placed under custody of another officer or N. C. O. Q.R. VI.18

If a guard be placed over an officer in arrest this does not free him from the consequences of breaking his arrest.

Arrest is of two kinds, "close" and "open." When arrest is not described as open arrest, it means close arrest. An officer in close arrest is not allowed to leave his quarters or tent. When in open arrest he may take exercise at stated periods within defined limits, usually the precincts of the barracks or camp, but may not enter any mess premises, etc. An officer in arrest must always appear in uniform, without sash, sword or belts. Q.R. VI.19

Although a superior officer may order an inferior under arrest without previous investigation of the offence, as a rule no officer should be placed under arrest without previous investigation of the offence by his C. O., who will then only place him under arrest if he thinks it necessary to proceed with the case. If he prefers charges against an officer he will invariably place him under arrest, but he must then report the circumstance without delay to the general officer commanding. Officers who are not themselves permanently in command but only temporarily so should only use this power when it is absolutely necessary to make an instant example. Q.R. VI.20 Q.R. VI.22 A.A. 45 (3)

All officers are required to at once interfere for the prevention of quarrels, frays, or disorders. For this pur- A.A. 45 (3)

pose an officer may order under arrest any officer of whatever corps, though he be of higher rank, engaged in a quarrel, fray, or disorder, for all officers of whatever
A. A. 10. condition have the power to quell disorders. Section 10 of the Act provides punishment for disobedience of such an order.

In addition to these authorized cases, there have been others which cannot be legislated for beforehand, but which can only be justified after the event, as it is then an illegal act which may be necessitated by circumstances. The senior captain once placed his C. O. under arrest for being drunk on parade, and his conduct was approved of by the C. in C. A peculiarity in this case was that before taking this step the senior Captain consulted with the other officers on parade; this action was remarked on by the C. in C. who stated he would have been better satisfied had the senior Captain acted wholly and solely on his own responsibility. Consultation touches too much on a combination against a superior.

Such a course is however an extreme one, in most cases it would be sufficient to report the matter.

No officer can put another or a N. C. O. in arrest, nor can he confine a soldier, if an officer senior to himself be present, except in the case of the senior being engaged in a quarrel, fray, or disorder.

A.A. 22 Military custody is regarded as legal custody, and escape is punishable by military law.

No junior officer can refuse to go under arrest when put in arrest by a senior. He is under arrest whether he acknowledges it or not; and if he do not at once proceed to his quarters, he is
Q.R. VI.21 guilty of having broken his arrest. An officer can only be released from arrest by the authority which imposed it, or by the superior to whom the case was reported; but as a rule, excepting where the arrest has been made through error, an officer should not be released by the officer who ordered the arrest without the sanction of the highest authority to whom the case has been referred.

Q.R. VI.23 An officer who has been placed under arrest cannot demand a C. M., nor can he refuse to be released and to return to duty. Nor can any one demand to be arrested.
A.A. 42. If an officer thinks himself wronged by his C. O. and cannot receive from him, after due application, the redress to which he considers himself to be entitled, he may complain to the C. in C. who, after inquiring into the complaint, will report to Her Majesty through a S. of S. and receive Her directions.

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The rules in Q. R. VI. 19, 20, as to the arrest of officers apply to N. C. O.'s. A N. C. O. charged with a serious offence is placed under arrest forthwith; but if not serious it may be investigated and disposed of without previous arrest. A N. C. O. in open arrest is in charge of the Orderly Sergeant. Q.R. VI.24

The military custody of private soldiers (not under sentence) means confinement under charge of a guard, picquet, patrol, sentry, or provost marshal. In permanent barracks such confinement for a serious offence will be in the *prisoner's room* attached to the guard room; or if the prisoner has to be kept apart, as in the case of drunkenness, then in the *guard room cells*. Q.R. VI.25

In case of minor offences, such as short absence from tattoo, overstaying a pass, or slight irregularities, a private soldier is not considered as a prisoner but will only be confined to barracks until the case is disposed of, for which purpose he will be ordered to attend at the next orderly room. He will attend all parades but will not be detailed for duty; he will therefore in mounted corps have to attend to his horses, harness, etc., which is a great advantage.

In certain cases, as when in billets or on the line of march, soldiers may be confined by an order signed by their C. O. in any prison, police station, etc., for a period not exceeding seven days.

A private who refuses to obey an order distinctly given, or resists the authority of a N. C. O., is to be confined without altercation. When a N. C. O. confines a soldier he should always obtain the assistance of one or more privates to conduct the offender to the guard room, and should himself avoid coming in contact with him except under unavoidable circumstances. Q.R. VI.26

The Commander of a guard or a provost marshal cannot refuse to receive any person handed over to him for custody by an officer or N. C. O. A. A. 45 (4)

The person who commits a prisoner has to furnish the commander of the guard with the offence in writing signed by himself, at the same time or within 24 hours, (in the A. A. 21 (2)

latter case a verbal report should at least have been given at the time); but neglect to do so does not absolve the commander of the guard from the necessity of receiving the prisoner into custody.

The commander of a guard has, as soon as he is relieved from duty, or if not relieved sooner then within 24 hours after the commitment of any prisoner, to furnish the officer
A.A. 21 (3) to whom he may be ordered to report the prisoner's name and offence, and the name and rank of the person who committed him; and this officer, if no crime is forthcom-
Q.R. VI. 16 ing within 48 hours to justify the detention, will order the release of the prisoner.

Soldiers once confined can only be released by proper authority; *i.e.*, if confined regimentally by the C. O. of the regiment, but if confined in a garrison guard, by the officer commanding the garrison. The standing custom in all garrisons is that prisoners confined in garrison guards can only be made over to their regiments by order of the staff officer who manages these duties, because the confinement may have been imposed by garrison authority such as military police.

A person illegally or unnecessarily detained in confinement has a legal remedy at law by obtaining a writ of habeas corpus from a Superior Civil Court, but law courts will not give damages for any honest exercise of military authority, even though exercised on mistaken facts and on wrong inferences and though prejudicial to the prisoner. A prisoner must therefore have a very strong case indeed to obtain compensation by civil law.

A.A. 43. If a soldier thinks himself wronged in any matter by an officer other than his captain or by a soldier, he may complain to his captain: if he thinks himself wronged by the latter then to his C. O.; and ultimately, if he considers himself still wronged, to the general or other officer commanding the district or station, who will have to inquire into the matter and if necessary take steps for giving full redress. A soldier is in no way punishable for making a complaint whether it be frivolous or not. But if

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an officer or soldier in making a complaint makes false statements affecting the character of any officer or soldier, or if material facts be wilfully suppressed, he can be punished under A. A. 27. A.A. 27 (2)

An offender while in arrest or confinement is not to be required to perform any military duty other than the handing over of any cash, stores, or office for which he is responsible. He is not to be permitted to bear arms except by order of his C. O. in case of emergency or on the line of march. If by error, or in case of emergency, he has been ordered to perform any duty he is not thereby absolved from punishment for his offence. Q.R. VI. 31

The Duke of Wellington's opinion was that if an offender was called upon to perform any honorable duty, such as to take part in an action against an enemy, this should be held to condone the offence. This is now the general opinion for all ordinary offences, though legally the prisoner is not absolved by being put on such duty.

A different practice obtains in the navy where from the necessity of manning the ship a sailor is constantly employed on duty and tried afterwards.

POWER OF COMMANDING OFFICER.

Every description of military offence can technically be tried by any military tribunal, that is, by the C. O. or by any description of C. M. allowed; at the same time a limitation is imposed on the punishments which a C. O. or the lower descriptions of C. M. can inflict, and it is not the object of the Act that serious offences should in practice be summarily dealt with by the C. O. or tried by R. C. M., but that a higher or lower description of C. M. should be convened according to the nature and degree of the offence. Q.R. VI. 61

Although then a C. O. is not compelled *by the Act* to send any offence before a C. M. yet he must observe the instructions he may receive in the Regulations as to the offences which he is at liberty to dispose of summarily or by R. C. M. without reference to superior authority. The Regulations prescribe that a C. O. may, without refer- Q.R. VI. 35

ence to superior authority, dispose summarily of, or try by R. C. M., a charge for an offence under the following sections of the Act :—

Sec. 10 (*except Sub-Sec.* 1).—(2) Striking or offering violence to any person subject to military law or not, in whose custody he is placed.

(3) Resisting an escort.

(4) Breaking out of barracks, camp, or quarters, (soldiers only).

Sec. 11. Neglecting to obey any general, garrison or other orders.

Sec. 15.—(1) Absenting himself without leave (excepting absence exceeding 21 days.)

(2) Failing to appear at parade, or leaving it without permission.

(3) Going beyond fixed limits of camp or garrison without a pass (soldiers only.)

(4) Absence from school without leave, (soldiers only.)

Sec. 19. Drunkenness whether on duty or not on duty.

Sec. 24.—(1) Making away with (pawning, selling, destruction, etc.,) arms, ammunition, equipments, clothing, necessaries, horse.

(2) Losing any of the above by neglect.

(3) Making away with (pawning, selling, etc.) any military decoration.

(4) Wilfully injuring any of the above, or any property belonging to the public or to an officer or other soldier.

(5) Illtreats any horse.

Sec. 40. Being guilty of any act, conduct, disorder, or neglect, to the prejudice of good order and military discipline, *i.e.*, for any offence other than those mentioned in the Act, or the above.

The C. O. may, if he sees fit, refer the charge to superior authority and apply for a superior court; and a charge for any other offence than the above will be so referred unless the C. O. considers delay inexpedient, in

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which case he may dispose of it himself reporting his action immediately.

The officer to whom the case is referred may again refer it to higher authority, or may direct it to be disposed of summarily or by R. C. M., or if he has power to convene a D. C. M. he may convene a D. C. M. to try it; similarly with a G. C. M. Q.R. VI.58

An offence punishable with death or P. S. should not be disposed of summarily, or by a R. or D. C. M., except under the orders of an officer empowered to convene a G. C. M.; but when delay would be inexpedient, he may dispose of the case without reference to higher authority, but then he must report his action. Q.R. VI.60 Q.R. VI.65

The proper authority to convene a R. C. M. is the C. O. of the person charged, and although an officer who is authorized to convene a G. or a D. C. M., or an officer in command of a mixed force, has power to convene a R. C. M. he should, when he orders a case to be disposed of by R. C. M., direct the C. O. to convene it himself, unless of course the C. O. cannot form a court with the officers under his command. Q.R. VI.58

SUMMARY PUNISHMENTS.

A C. O. on investigating the charge against a N. C. O. or private may *dismiss* it if the evidence is insufficient or if he thinks the charge ought not to be proceeded with; or he may simply *admonish* the offender. A. A. 46. R.P. 4.

In all first offences, not of an aggravated character, mild reproof and admonition should be tried and punishment not resorted to until mild treatment fails. Q.R. VI.1

Should the C. O. consider that the case deserves punishment, but is not sufficiently serious to require trial by C. M., he can award the following punishments:—

I. *To a private soldier*:

(*a.*) Imprisonment with or without H. L.; not exceeding seven days. A.A. 46. Q.R. VI.41

In the case of absence without leave this may be extended to 21 days provided the term of imprisonment, if exceeding seven days, does not exceed the number of days of absence.

(*b.*) Fine for drunkenness not exceeding ten shillings according to scale. The award when prescribed by scale is compulsory.

(For scale vide Q. R. VI. 56.)

(*c.*) In case of absence without leave, not exceeding five days, deprivation of pay for every day of absence.

(If the absence exceeds five days the C. O. makes no award, as the pay is compulsorily forfeited by Royal Warrant.)

A.A.128(4,6) (*d.*) Deduction from ordinary pay as authorized by the Act; *i. e.*, to make good any expenses caused by him, or for any loss, damage, or destruction to arms, ammunition, necessaries, etc., or to any property.

The following minor punishments may also be awarded except for an offence for which imprisonment exceeding seven days is awarded:—

(*f.*) C. B. not exceeding 28 days, which carries with it punishment drill to the extent of 14 days.

(*g.*) Extra guards or piquets; only for irregularities on those duties (usually limited to form one to three).

Any of the above punishments (*a.* to *g.*) may be awarded severally or conjointly subject to the following provisions:—

When imprisonment exceeding seven days is awarded for absence no minor punishment can be given in addition in respect of the offence of absence without leave.

When an award includes imprisonment and a minor punishment, the latter takes effect at the termination of the imprisonment.

A single award of punishment including imprisonment and C. B. must not exceed 28 days.

A soldier undergoing imprisonment or C. B. may, for a fresh offence, be awarded further punishment of imprisonment, or a minor punishment, or both, to commence at the expiration of the former; provided that no soldier be imprisoned by summary award for more than *seven* consecutive days (except for absence without leave) and that the whole extent of consecutive punishment including imprisonment and C. B., does not exceed 56 days.

REMARKS ON THE ABOVE PUNISHMENTS.

Q.R.VI.47. *Absence without leave* terminates when the soldier is

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taken into custody, and in awarding punishment the C. O. has to make allowance for any unusual delay in disposing of the case.

Absence without leave above 21 days constitutes desertion; and a C. O. cannot deal with the offence as the offender must be tried by C. M. except in the case of a soldier confessing desertion when his trial may be dispensed with by competent authority.

Imprisonment.—The ordinary term of seven days imprisonment, which is generally carried out in the provost cells, may be awarded for any offence but should as a rule be reserved for the more serious offences of violence, insolence to superiors, absence without leave, and for oft repeated acts of drunkenness or other offences; in aggravated cases it may precede further punishment of C. B.

When the imprisonment awarded exceeds seven days, the soldier may demand that the evidence against him be taken on oath in the orderly room, and the same oath or solemn declaration as that given to witnesses on a C. M. is to be administered. A.A. 40 (6)

Up to seven days inclusive the award of imprisonment is in hours, exceeding seven days in days.

The term of imprisonment when awarded *in days* begins on day of award; when *in hours* it begins at the hour when the prisoner is received at the prison to which he is committed, or if not received sooner, then on the day after the day of award at the hour fixed for the commitment and release of prisoners. R. P. 6.

Time, under the Rules of Procedure, is reckoned exclusive of Sunday, Good Friday, and Christmas Day, but any time reckoned for the purposes of R. P. 6; or of any punishment, or deduction of pay, includes those days. R. P. 134.

Confinement to barracks is considered sufficient punishment for slight offences; it may be combined with imprisonment not exceeding seven days, deprivation of pay, or fine.

It carries with it punishment drill to the extent of 14 days (any 14) and fatigues all the time. Q.R.VI.42.

Drill lasts for one hour at a time and four hours a day. Defaulters are not to be required to undergo any portion of their punishment drill or C.B. which may have lapsed by reason of their being in hospital or employed on duty.

A.A. 138. *Deprivation of pay.*—The total amount of deductions (including fines) must not exceed such sum as will leave to the soldier, after paying for his messing and washing, less than one penny a day.

Q.R.VI.58.

Q.R.VI.48. But a soldier forfeits the whole of his pay *without residue* while in hospital for illness certified by the medical officer to have been caused by an offence.

A.A.140(2) In calculating time for deduction of pay, or for days of absence, or imprisonment, no time is reckoned as a day unless it amount to six hours or upwards, whether wholly in one day or partly in one day and partly in another, or unless such absence prevented the absentee from fulfilling any military duty which was thereby thrown upon some other person.

A.A. 46 (8) A soldier ordered by his C. O. to suffer imprisonment, or pay a fine, or any deduction from his pay, or who is awarded a punishment which entails any deduction, has a right to be tried by a D. C. M. instead of submitting to such punishment. But as deduction of pay for absence above 5 days is prescribed absolutely there can be no appeal in this case, nor can there be any appeal against any minor punishment. The C. O. may, after awarding a summary punishment, change his mind and remand the prisoner for trial by C. M., but he must do so *before* the soldier leaves his presence after the award is made.

R. P. 7.

On appeal the soldier may demand to be tried by a D. C. M. but otherwise, if the C. O. thinks fit, he may be tried by R. C. M.

In all cases when a soldier has a right of appeal, the C. O. must inform him of his right and ask him if he wishes to be tried. If he omits to ask this question the soldier may at any time on the same day before the hour fixed for the commitment and release of prisoners, claim his right to be tried by C. M.

A. A. 46 (7) An offender is not liable to be tried by C. M. for any offence which has been dealt with summarily by his C. O., and vice versâ.

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Drunkenness.—Where the charge against a soldier is for drunkenness not on duty, and it is not an "aggravated offence of drunkenness" (see p. 14), the C. O. *must* dispose of the case summarily, unless the soldier was drunk after being warned for duty, or unless he has been guilty of drunkenness on not less than four occasions in the preceding twelve months not including the case under disposal. A. A. 46 (3)

A private soldier then is not to be tried by C. M. for a simple act of drunkenness except as above; but if a soldier is awarded such punishment as gives him a right to be tried by C. M., he may be tried by any C. M. for any act of drunkenness. Q.R.VI.51.

If the number of previous instances recorded against a soldier within twelve months is between four and eight, it is optional with the C. O. to dispose of the case summarily or to try it by C. M.; but if they amount to eight the offender should, as a rule, be tried. Exception may be made to this rule at the discretion of the C. O., if within twelve months the soldier has been guilty of an act of simple drunkenness (unaccompanied by any other offence) for which he has been tried and convicted by C. M.

The twelve months are reckoned without any deduction on account of forfeiture of service or absence from duty, and all entries of drunkenness are counted, whether disposed of by the C. O. or C. M. Q.R.VI.52.

Discretionary power is given to C. O's of marking offences of short absence without leave as equivalent to an act of drunkenness for the purpose of imposing a fine, but such entries in the defaulter book which are specially marked "D" cannot be reckoned as instances of drunkenness for the purpose of determining liability to trial. Q.R.VI.53.

Convictions by C. M. for absence without leave or desertion are not to be counted as equivalent to acts of drunkenness.

When simple drunkenness is in connection with a more serious offence for which the offender is to be tried by C. M., he should not be charged with the drunkenness before the C. M. unless he is liable to trial and the C. O. considers it should be tried; but the C. O. will impose the usual fine. Q.R.VI.55.

In dealing with a simple act of drunkenness unconnected with another offence, C. B. should only be added to a fine if the aggravated nature of the offence seems to Q.R.VI.57.

demand it, and imprisonment is never to be awarded for drunkenness not triable by C. M. except where the amount of unpaid fines amount to 20 s., in which case the C. O. should not award an additional fine, but impose imprisonment or other punishment instead.

It must be noted that Sec. 19 and Sec. 46 (3) of the Act give complete jurisdiction to C. M. to try any offence of drunkenness; hence at a C. M. a prisoner cannot plead in bar of trial that less than four offences of drunkenness have been committed within twelve months.

II. *To a Non-Commissioned Officer :*

N. C. O's are not liable to summary or minor punish-
Q.R. VI.48. ments, but they may be reprimanded or severely reprimanded by the C. O.

A private soldier may not be reprimanded.

Should a C. O. consider a N. C. O. deserving of punishment he must send him for trial to a C. M.

Stopping leave and not recommending for promotion are not punishments. Leave is an indulgence not a right, and promotion is a reward.

These remarks apply also to officers who may be sent to extra parades, etc., to learn their work, although a C. O. cannot award them any punishment.

A.A.183(c) Acting N. C. O's may be ordered to revert to their permanent grade.

Q.R.VII.72 N. C. O's may, with the consent of their C. O., resign their rank ; but not for the purpose of escaping trial by C. M. without the special sanction of the General commanding.

G.O.13.1882 N. C. O's may be removed from any appointment they may hold by order of their C. O.; but this power is not to be exercised by a C. O. on a N. C. O. whose rank is higher than that of Corporal, but application should be made to head-quarters.

A.A.183(i) N. C. O's may not be punished summarily by the C. O. for the offence of drunkenness.

Q.R.VI.4. A N. C. O. may be reproved by his C. O. but not in the hearing of men unless it be necessary to do so for the sake of example.

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AWARDS BY OFFICERS COMMANDING TROOPS, BATTERIES, OR COMPANIES.

The C. O. may delegate power to these officers of awarding soldiers, for minor offences, minor punishments not exceeding 7 days C. B. Such awards may be remitted by the C. O., and are to be reported to him before the hour for disposing of prisoners. These officers have no power of punishment unless the C. O. chooses to delegate his power, but this is usually done. Q.R.VI.48. Q.R.VI.34.

Subalterns are also sometimes allowed to award men one extra drill for trifling offences. Such awards are reported in writing to the C. O. through the Captain; no record of such punishment is made.

RECORD OF OFFENCES.

For the purpose of keeping a proper record of offences committed by N. C. O's and soldiers three separate books are kept, one or more sheets being devoted to each soldier:

1. *The Regimental Court Martial Book* contains a record of the trial of soldiers by C. M. The charges, findings, sentences, and minutes of confirmation are entered in full. Q.R.XXII. 48.

All convictions by C. M. are recorded even if punishment is remitted. Acquittals are not recorded, and if the proceedings are "quashed" all record is erased. If a "Free Pardon" is granted the record stands but does not injuriously affect the soldier all lost service being restored.

This book also contains certified copies of all convictions by civil power for which the imprisonment awarded exceeds seven days; these are annexed to the soldiers court martial sheet, as well as copies of the declaration of a court of inquiry held to record the illegal absence of a soldier. Q.R.XXII. 49. Q.R.XXII. 51.

A confidential guard-book is also kept containing copies of charges against officers, if any. Q.R.XXII. 47.

2. *The Regimental Defaulter Book* contains all entries in the C. M. book and all offences for which a punishment of over seven days C. B. has been awarded, and all reductions of N. C. O.'s to a lower grade or to the ranks; also every case of desertion or fraudulent enlistment in which trial has been dispensed with, and *every* conviction by civil power where any imprisonment has been under- Q.R.XXII. 39.

gone. If only a fine has been paid the C. O. may, with the sanction of the general, not make a regimental entry.

Q.R.XXII. 65. 3. *The Troop, Battery, or Company Defaulter Book* contains all entries in the above two books as well as all minor Q.R.VI.48. offences. All charges against private soldiers are entered even when they are admonished, but when the charge is dismissed it is not entered. When a N. C. O. is admonished for any offence it is not entered against him in the defaulter book.

Offences are classified as "company" or "regimental" according to the punishment awarded: regimental offences are notified in regimental orders, and these only affect good conduct pay.

Q. R. XXII 39, 41 detail the punishments which entail regimental entries.

PUNISHMENTS ON BOARD SHIP.

Q.R.XVII. 74. On board H. M. ships all officers and troops, whether belonging to the regular or auxiliary forces, are subject to A. A. 186. the authority of the captain of the ship, and to the Naval Discipline Act.

Should a soldier on board such a ship commit a minor offence, he can be punished by the captain of the ship provided that the military C. O. concurs in the punishment.

No military C. M. can be held on board any of H. M. ships in commission, consequently if any officer or soldier commits any act which the C. O. of troops considers to require trial by C. M., the offender must be disembarked on the first opportunity, or be removed to a transport ship not in commission, and be there proceeded against according to military law.

For further regulations see Q. R. XVII. 74.

The C. O. of troops on board any ship, whether com- A. A. 138.(6) missioned or not, may deprive a soldier of his liquor ration for 28 days, or if he does not receive such ration, then the sum equivalent to such ration not exceeding one penny a day.

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PROVOST MARSHAL.

For the prompt repression of all offences committed *abroad*, provost marshals with assistants may be appointed by the General commanding a body of forces. A.A.71.(1)

Provost marshals are commissioned officers, while their assistants may be selected officers or N. C. O.'s. On active service they have important duties to perform in connection with the maintenance of good order in the force. Q.R.VI.107, 108.

These officers may at any time arrest and detain for trial persons subject to military law committing offences, and may also carry into execution any punishments awarded by C. M., but they cannot inflict any punishment on their own authority. These officers have to receive and keep any person committed to their custody by any officer or N. C. O. A.A.71.(9)

A.A.45.(4)

INVESTIGATION OF CHARGES.

As soon as possible after a person is taken into military custody the C. O. investigates the cause of arrest or confinement. This investigation is to take place without unnecessary delay, *i. e.*, within 48 hours, exclusive of Sundays and holidays, by the C. O. of the regiment, battalion, battery or detachment as the case may be. Every case of detention beyond 48 hours is to be reported to the Officer Commanding the district or station. A.A.46.(5)

R. P. 9.

Prisoners should be disposed of daily (Sunday, Good Friday and Christmas day excepted), and when practicable in the morning before the C. O.'s parade. Q.R.VI.88.

In case of drunkennes, 24 hours should be allowed to elapse before investigation to allow the offender to become perfectly sober. Q.R.VI.97.

Prisoners before their cases are investigated are examined by a medical officer with a view to their being admitted into hospital if not in a fit state to undergo punishment. Q.R.VI.88.

If the offence is a trivial one it is dealt with by the officer commanding the offender's troop or company, all charges not so disposed of are investigated by the C. O.

in the presence of the officer commanding the troop or company who will attend with the company defaulter book.

R. P. 3. Every charge against a soldier is investigated in presence of the accused.

A.A.45(1) If officers and soldiers, not on active service, are to be tried by C. M., and a delay of more than *eight days* occurs R. P. 1. before a C. M. is ordered to assemble, as when prisoner is in hospital, absence of witnesses, not enough officers to form the court, etc., the C. O. has to make a special report to the officer commanding the station explaining the delay; and a similar report must be made every eight days till either a C. M. is assembled or the prisoner released, but neglect to do this would not invalidate the trial unless the prisoner was prejudiced thereby.

COURSE OF PROCEDURE AT ORDERLY ROOM.

Q.R.VI.30. Soldiers whilst under examination (or trial) are deprived of any articles they can make use of as missiles; their caps, belts, spurs, etc., are therefore removed. The escort, prisoner, and witnesses, are marched in. The Captain gives the name and regimental number from defaulter sheet; the C. O. then reads the crime from the guard report, and asks the accused if he admits it: then, following the rules for R. C. M. (whether he admits it or not) he hears the evidence, only one witness being present at the same time if the accused desire it (it is customary in ordinary cases for all witnesses to be marched in together).

R. P. 3. The accused has full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defence. For this purpose, after all the witnesses have been heard, the C. O. asks him if he has anything to say. In the case of absence without leave A.A.46. (8) over seven days the accused may demand evidence to be R. P. 3, 80. taken on oath, as if he was before a C. M.

The C. O. then "deals with" the accused, and either dismisses the case (when the crime is cancelled); or being satisfied with the guilt of the accused, he then looks at

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his defaulter sheet, and after hearing anything the Captain has to say deals with the accused, if a private soldier, as follows:—

He either admonishes him, or awards him a minor punishment, entering such sentence in the guard report (or crime slip), or he remands him for trial by C. M., for decision of superior authority, or for permission to hand him over to the civil power.

If he thinks the case not sufficiently serious to require trial by C. M., but is of such a nature as to require a more serious punishment than a minor punishment and he can deal with the case himself, and he purposes awarding him a punishment entailing imprisonment, fine, or deduction from pay, he will, before awarding such punishment, inform the soldier of his right to be tried by D. C. M., and will ask him if he wishes to be so tried. R. P. 7.

If the accused is a N. C. O. he can only be admonished, deprived of an appointment or acting rank, or remanded for trial, or for decision of superior authority or for permission to hand him over to the civil power.

If the accused is remanded for trial by C. M., the C. O., as soon as possible, either issues an order for the assembly of a R. C. M. or applies for a superior C. M. to be convened; any such delay must not ordinarily exceed 36 hours. R. P. 4.

Where the accused is remanded for trial by G. or D. C. M. the evidence of the witnesses is taken down in writing *in presence of the prisoner* who, if there is any variance between such evidence and that previously given, may put questions to the witness with reference to such variance; and such questions with the answers are added in writing to the evidence taken down. R. P. 5.

The evidence as taken down is then read to each witness and is signed by him. Any statement of the prisoner material to his defence is also taken down.

This evidence is taken down in the presence of the C. O. or of any officer for him, and the C. O. may, if he thinks fit, re-hear the case and reconsider his decision and dispose of the case summarily.

R. P. 6. But when the C. O. has once awarded punishment for an offence he cannot afterwards increase the punishment. Thus it would be illegal for a C. O. to award a summary punishment, then cancel it after the prisoner has left his presence, recall him, and then remand the case for trial by C. M.

R. P. 5. The above evidence and statement (if any), termed the "summary of evidence," or a true copy, is laid before the C. M.; and if the convening officer considers it desirable a true copy is also given to the prisoner gratis, or if not, the prisoner may request a copy to be given him on payment of one penny for every seventy-two words; where the prisoner has not obtained a copy, the court may permit him to inspect the one laid before the court or may order a copy to be given him gratis.

This is in strict accordance with the practice of the criminal courts, for there is a Statute on the subject which states that the prisoner can demand the copies of depositions against him on payment, and also he and his counsel can, at the time of trial, inspect the depositions against him.

Q.R.VI.36. It is considered undesirable to send a case before a C. M. when it appears doubtful if the evidence will secure a conviction, except when it is important that the guilt or innocence of the accused should be definitely decided. In such a case the charge should not be proceeded with as A. A. Sec. 46 requires the C. O. to dismiss it.

Q.R.VI.37. Before proceeding with a case it is the duty of the C. O. to ascertain that the soldier can be legally tried having regard to the limitations of time prescribed by the Act. (See Jurisdiction of C. M. chap. V.)

Q.R.VI.38. If sufficient evidence is not forthcoming as to whether the accused has or has not committed the offence, and there is no opportunity of carrying the investigation further at the time, the accused, if the charge is serious, may be released from custody and ordered to do duty. If at a future time further evidence is forthcoming he may be re-arrested and the case proceeded with. If however the offence is not serious, the prisoner should be released and the case dismissed.

Q.R.VI.39. If during the investigation of an offence, another offence is disclosed which cannot be immediately proceeded with, the former may be proceeded with and the latter held over as above.

R. P. 8. In the case of a commissioned officer the C. O. investigates the case in the same way as for a soldier, and the

evidence, if the officer requires it, is taken down in writing. The C. O. can either dispose of the matter himself or forward it for the decision of superior authority.

Where an officer is ordered for trial by C. M. without any such taking of evidence in his presence, an abstract of the evidence to be adduced shall be delivered to him gratis not less than 24 *hours* before his trial, and a copy is also laid before the court.

It is usual to have a full inquiry by a regular Court of Inquiry before resorting to trial. Such a court cannot give an opinion but merely records facts and evidence; but it is not necessary that the officer be tried whatever facts may be disclosed.

Every officer whose character or conduct as an officer and gentleman has been publicly impugned, is bound to submit the case to his C. O. for investigation. Q.R.VI.40.

The commanding officer of a detachment is vested with the same powers as a C. O., but a superior authority may, having regard to his rank and experience, if below the rank of Major, restrict him from the exercise of any or all the powers of a C. O. including the convening of a R. C. M. But should necessity arise he may act to the full extent of his powers reporting his action without delay. Q.R.VI.13, 74.

APPLICATION OF THE ACT TO N. C. O.'s.

The obligation of a C. O. to deal summarily with a case of drunkenness does not apply to a N. C. O. A.A. 183.

The C. O. has no power to punish a N. C. O., but he may deprive a N. C. O. of any acting rank or appointment he may hold, and reprimand him.

The C. in C. (and in India the C. in C. of the forces, or in a presidency) may reduce a N. C. O. to a lower grade or to the ranks.

A N. C. O. may be reduced by sentence of a C. M. to any lower grade or to the ranks, in addition to any other punishment.

When reduced to a lower grade he takes precedence in the lower grade. Q.R.VII.73.

A N. C. O. sentenced by C. M. to P. S. or imprisonment is deemed reduced to the ranks.

Q.R.VI.49. When a N. C. O. is convicted of any offence by the civil power, the case is reported to superior authority with the view of his reduction to the ranks by special authority of the C. in C. should the General Commanding the district think it desirable to recommend such a course.

A N. C. O. is not liable to summary punishment for any offence committed while a N. C. O.

An army School-master cannot be reduced to the ranks, but the C. in C. (and in India as above) may dismiss him.

A C. M. may sentence him to P. S. or imprisonment or to a lower grade of pay, or to be dismissed; if sentenced to P. S. or imprisonment he is deemed dismissed. (See Q. R. IX. 42.)

APPLICATION OF THE ACT TO WARRANT OFFICERS.

A Warrant Officer holding an honorary commission is a Commissioned Officer.

A.A. 182. Other warrant officers cannot be punished by their C. O. nor tried by R. C. M.

The President of a C. M. for the trial of a warrant officer must in no case be under the rank of captain.

A C. M. other than a R. C. M. can only sentence him to the following punishments, and no other:—

Dismissal.

Suspension from rank, pay, and allowances for a stated period.

Reduction to the bottom or any other place in the list of his rank.

Reduction to an inferior class of warrant officer (if any).

If originally enlisted as a soldier:—

Remanded to a corps in the same branch of the service as that to which he formerly belonged, there to occupy the position he held before his transfer to be a warrant officer.

Remanded to a corps as above and reduced to the ranks.

A warrant officer reduced to the ranks or remanded to regimental duty in the rank of private cannot be required

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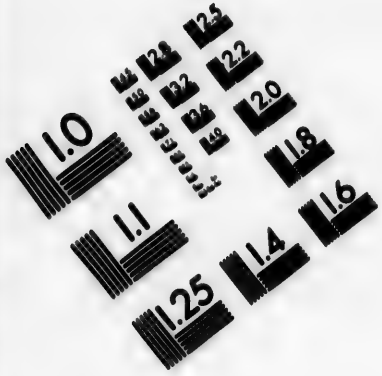
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to serve in the ranks as a soldier. But the Q. R. direct that whenever a warrant officer is reduced to the ranks by sentence of C. M. his discharge from the army is forthwith to be proceeded with, unless he consents to serve as a private soldier on his former attestation. If not otherwise eligible for discharge he will be discharged in consequence of his services being no longer required. Q.R.VII.09

Application of the Act to Persons who do not belong to H. M. Forces.

Any person subject to military law who does not belong to H. M. forces, such as camp followers, may be tried by any description of C. M., *other than an R. C. M.*, convened by an officer authorized to convene such a court. A. A. 184.

Any such person when attached to a corps is under the command of the C. O. of that corps, or when not attached to any corps he is under the command of any officer named for the time being as his C. O. by the General or other Officer Commanding the force; but such person is not liable to be punished by a C. O. or by a R. C. M.



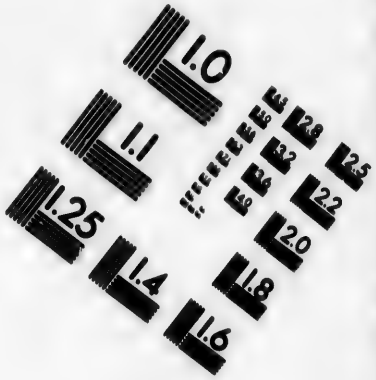
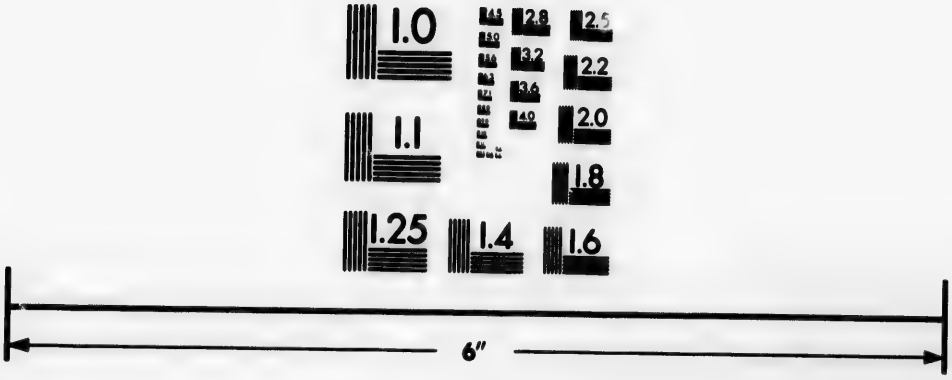


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CHAPTER V.

COURTS MARTIAL.

There are five descriptions of Courts Martial:

1. General Court Martial.
2. District Court Martial.
3. Regimental Court Martial.
4. Field General Court Martial.
5. Summary Court Martial.

Of these the Field G. C. M. and S. C. M. can only be assembled under special circumstances and when it is impracticable to assemble an ordinary C. M., and as the rules and provisions relating to these courts are exceptional they will be dealt with separately.

A. A. 49. It may, however, be here stated that a Field G. C. M. may be assembled by *any* officer commanding *any* detachment of troops "in any country beyond the seas" on complaint being made to him that an offence has been committed, by a person subject to Military law under his command, against the property or person of any inhabitant or resident in such country. And a S. C. M. can

A. A. 56. only be assembled *on active service*, and may be convened by *any* officer in immediate command of a body of forces on active service.

Of the three regular courts, G. C. M., D. C. M. and R. C. M., the G. C. M. is the highest in jurisdiction and power, and next to it the D. C. M.

All C. M. are required to try cases brought before them according to the terms of the Army Act and to the rules of evidence. They have power to acquit or convict, and power to sentence to such punishments as are authorized by the Act; but sentences of C. M. carry with them no legal liability to punishment until they are "confirmed" by the proper authority.

CONVENING COURTS MARTIAL.

Her Majesty may convene a G. C. M.; and she is empowered to issue warrants under Her Sign Manual authorising certain qualified officers, (viz: the C. in C., and any officer not below the rank of F. O. commanding for the time being any body of regular forces within or without H. M. dominions, also the Lord Lieutenant of Ireland, the Governor General in India, and a Governor of any Colony on whom the command of any regular forces is conferred), to convene a G. C. M. for the trial of any person subject to Military law, and to confirm the findings and sentences of such C. M., or to reserve such confirmation by Her Majesty. A.A.48.(1) A.A.122.(1) A.A.122.(6) A.A.122.(1)

Her Majesty may also in the same way empower any of the above officers to delegate to any officer under their command not below the rank of F. O. authority to convene G. C. M. for the trial of persons subject to military law within the territorial limits of their command, and to reserve the findings and sentences for their own confirmation or to delegate that authority also.

In any place out of the U. K. where a F. O. cannot be had, and hardship would be inflicted on persons accused of offences if not brought to speedy trial, a Captain may have the same authority delegated to him as a F. O.

The same officer may or may not be appointed convening and confirming officer. A.A.122.(2)

Warrants may be addressed to officers by name or by designation of their offices, and the power they convey A.A.122.(4)

C.M. for the trial of native officers, soldiers, and followers of the Indian army are regulated by Articles of War framed by the Indian government, though C. M. may be convened for their trial under Sec. 180 of the Act.

may be limited to the officer named, or be extended to a person performing his duties and to his successors in command, and they contain full instructions as to the extent of the authority which they convey, and the special terms of a warrant are never to be exceeded. Thus in some cases warrants convey authority to confirm the proceedings of C. M., in others they do not. The powers conferred by a warrant, or delegated, may at any time be revoked by the authority which grants them.

A. A. 48(2) Any officer authorised by warrant to convene a G. C. M. may convene a D. C. M. and confirm the finding and
A.A. 123. sentence; and he may delegate his powers to do so to any officer under his command not below the rank of Captain, subject to such restrictions as he may see fit to impose.

Any such authority may be addressed to officers by name or otherwise as in the case of warrants for G. C. M., and the same officer may or may not be appointed convening and confirming officer.

Warrants are issued annually, but the old warrant remains valid even should a new one not arrive.

The effect of a warrant is not influenced by its locality. An act may be committed outside the jurisdiction of the warrant, yet the prisoner may be tried under it.

Abroad the warrant conveys power to appoint J. A.'s and Provost Marshals.

No G. C. M. can be assembled except by an officer holding a warrant; and no D. C. M. except by the above, or by an officer to whom the power has been delegated.

A.A.47.(1) Any officer authorised to convene a G. C. M. or a D. C. M., also any C. O. not below the rank of Captain, also any officer not below the rank of Captain when in command of portions of two or more corps, also on board a ship not in commission, a C. O. of any rank may, without warrant, convene a R. C. M. for the trial of offences committed by soldiers under his command.

Q.R.VI.73. General officers or C. O.'s of a mixed force will, however, not themselves convene a R. C. M., but will direct the C. O. to convene such a court himself.

The proper authority to convene a R. C. M. is the C. O. of the accused, consequently General Officers, or C. O.'s of a mixed force, should, when they order a case to be disposed of by R. C. M., direct the C. O. to convene it unless he is unable to form an adequate court from want of officers.

The offences for the trial of which it rests within the discretion of a C. O. to convene a R. C. M. are specified in Chap. IV., page 34; charges for other offences, except in cases of emergency, being reserved for the orders of superior authority. Q.R.VI.02

In addition to R. C. M. the following C. M. may be convened by officers, whether they hold warrants or not, viz.: A. A. 49.

Field G. C. M. and S. C. M. A. A. 55.

These courts are convened under the authority of the Army Act by the officers therein authorised to do so.

CONSTITUTION OF COURTS MARTIAL.

All C. M. must be composed of commissioned officers, and all must themselves be subject to military law. R. P. 19.

Of the officers sitting on a Court one officer is President, and the others are members. A court, including the President, usually consists of an uneven number.

The Act fixes the legal *minimum* number of officers who have to sit on the different C. M., and also specifies their minimum length of service, as follows: A. A. 48. (3, 4)

		No. of Officers.	Length of Service.
G. C. M.	In the U. K., India, Malta and Gibraltar	9*	3
	Elsewhere	5	3
D. C. M.	In the U. K., India, Malta and Gibraltar	5	2
	Elsewhere	3	2
R. C. M.	Anywhere	3	1

*Not less than five must be not below the rank of Captain. A. A. 47. (3)

A. A. 48 (9)

The President of a C. M. is appointed by name by the convening officer, who cannot himself sit on the court. A. A. 50 (2)

A.A.46.(9) The President of a G. C. M. or D. C. M. must not be under the rank of F. O. unless the officer convening the court is under that rank, or unless (in the opinion of the convening officer, such opinion to be expressed in the order convening the court, and to be conclusive*), a F. O. is not, with due regard to the public service, available, when a Captain may be president. Similarly for a D. C. M. if a Captain is not availabe an officer under that rank may be president, but in such a case the power of
Q.R.VI.79. convening the court should not be exercised except in case of necessity.

Q.R.VI.87. Whenever General Officers or Colonels are available as Presidents of G. C. M. no officer of inferior rank is to be placed on that duty.

When a C. O. of a corps is to be tried as many members as possible are to be officers who have held or are holding commands equivalent to that held by the prisoner.

A.A.182.(4) The President of a C. M. for the trial of a warrant officer must in no case be under the rank of Captain.

A.A.47.(4) The President of a R. C. M. must not be under the rank of Captain, except when held on the line of march, or on board a ship not in commission, or unless (as above*) a Captain is not available, in which case an officer of any rank may be president.

R.P.21. The members of a C. M. for the trial of an officer must be of an equal if not superior rank to that officer, unless (as above*) officers of that rank are not available, and in no
A.A.48.(7) case is an officer under the rank of Captain to sit on a C. M. for the trial of a F. O.

A.A.50.(1) The officers sitting on a C. M. may belong to the same or different corps, or may be unattached, and may try
R.P.20. persons belonging or attached to any corps. But, as far as practicable, G.C.M. and D.C.M. should be composed of officers of different corps, and in no case are they to be composed exclusively of officers of the same regiment of cavalry or battalion of infantry, unless other officers are not (as above*) available, or cannot be obtained within a reasonable time from superior authority.

Thus an offender may be tried by R. C. M. notwithstanding there is no officer on the court belonging to his corps.

In the case of the prisoner belonging to the auxiliary forces, two members at least of the court should belong to the auxiliary forces, and one or both should belong to the same branch of the auxiliary forces as the prisoner, unless (as above,[56]) two such members are not available.

When the auxiliary forces are subject to military law they are altogether regarded as part of the regular forces, so that officers of the regular and auxiliary forces may sit together on C. M. Thus for the trial of men of the Volunteers officers of the regular army may sit on the court subject to the foregoing proviso. A.A.178.

The following officers are disqualified from sitting on C. M. in addition to those who are ineligible from want of service :— R.P.19.

1. The Convening officer. A.A.50.(2,3)

2. The Prosecutor or a witness for the prosecution.

3. The officer who investigated the charges before trial, or was a member of the court of inquiry relative to the charges.

4. The C. O. of the prisoner, or of the corps or battalion to which he belongs.

5. Any officer who has a personal interest in the case.

6. Any officer not subject to military law.

7. The confirming officer. A.A.54.(1)

The members of a C. M. take rank amongst themselves according to the dates of their army commissions, except when they are all of one regiment when they take rank regimentally. Officers of the regimental staff, as Quartermasters, Paymasters, and also Medical officers are not excluded from being members of C. M., but the President must always be a combatant officer. If a member is promoted during the trial, at the next sitting of the court he takes place at the table in accordance with his new rank; but if a member is promoted and becomes senior to the President no change is made in the constitution of the court as the President is appointed by name.

The number of officers ordered to sit on a C. M. within the statutory limits is at the discretion of the convening officer. For D. C. M. and R. C. M. the legal minimum will ordinarily be sufficient, but in the case of a G. C. M., Q.R.VI.85.

or where a trial is likely to be prolonged, two or four additional members will be generally appointed; and notwithstanding such an extra number, if an officer is challenged, and the challenge is allowed, he must be replaced. Waiting members should also be detailed to meet the case of reduction by challenge.

R. P. 18. As a rule the court must not sit until the full number of officers detailed is made up, for a court must be in accordance with the orders of the convening officer who always appoints the President by name and the number of members. If therefore by reason of challenge, disqualification, or otherwise, the full number is not available the court should adjourn unless they consider it inexpedient to do so in the interests of justice and for the good of the service, when, if not below the legal minimun, they may proceed recording their reasons for so doing.

If the Court adjourn at any time for the appointment of a new President or fresh members, the convening officer may convene another court.

Q.R. VI.86. Where the composition of a C. M. differs from the normal rule in respect either of the description or of the rank of the officers ordered to form the court, or on account of the suspension of the operation of a rule, care must be taken to adhere strictly to the prescribed form of the order convening the court, on the correct wording of which the legality of the trial may greatly depend.

SCALE OF PUNISHMENTS BY COURTS MARTIAL.

OFFICERS ACCORDING TO THE SCALE FOLLOWING:

A.A.44. (1) (*a*) Death.

(*b*) P. S. for not less than five years.

(*c*) Imprisoment, with or without H. L., for a term not exceeding two years.

(*d*) Cashiering.

(*e*) Dismissal from H. M. service.

(*f*) Forfeiture of seniority of rank either in the army or in the corps, or in both.

(*g*) Reprimand, or severe reprimand.

Cashiering is a sentence applicable to Commissioned Officers only. The distinction between cashiering and dismissal from the service is not clearly defined, nor has it been always observed. Cashiering is now considered a stronger term than dismissal and is supposed to render the officer unfit to serve Her Majesty again in any capacity. Cashiering has sometimes been mitigated to dismissal which does not carry with it any further penalty. Her Majesty may dispense with the services of any officer.

An officer cannot be sentenced to be suspended from duty or pay.

SOLDIERS ACCORDING TO THE SCALE FOLLOWING:

(*a*) Death.

(*b*) P. S. for not less than five years.

(*c*) Summary punishment as prescribed, but only on *active service*.

(*d*) Imprisonment, with or without H. L., for a term not exceeding two years.

(*e*) Discharge with ignominy from H. M. service.

(*f*) Reduction in the case of a N.C.O. to a lower grade or to the ranks.

(*g*) Forfeiture, fines, and stoppages.

When a punishment or "less punishment" is mentioned in the Act, "less" means lower down in the above lists of punishments.

Where a particular punishment is in the Act specified for any offence, any one punishment lower in the above scale may be awarded subject to regulations and to the nature and degree of the offence.

Before an officer is sentenced to P. S. or imprisonment he must be sentenced to be cashiered. A.A. 44.(2,3)

An officer may be sentenced to both forfeiture of seniority of rank and to reprimand or severe reprimand.

Reprimand may be either public or private. A public reprimand is administered on parade, a private reprimand by the C. O. of regiment or brigade in presence of the officers. The confirming officer decides which is to be done.

A.A. 183 (3, 4) A N. C. O. sentenced to P. S. or imprisonment is deemed to be reduced to the ranks. A N. C. O. may be reduced to a lower grade or to the ranks in addition to any other punishment.

An army School-master if sentenced to P. S. or imprisonment is deemed dismissed.

A N. C. O. cannot be sentenced to a reprimand by a C. M., but a C. O. has power to reprimand a N. C. O.

A.A. 44 (4) A soldier sentenced to P. S. or imprisonment may in addition be sentenced to be discharged with ignominy.

A.A. 44 (11, 12) Two punishments of distinctly opposite natures cannot however be awarded for the same offence unless authorised by the Act. Thus, combined sentences of summary punishment and P. S., or P. S. and imprisonment, would be illegal. On the other hand, punishment by fine, deprivation of pay, forfeiture of good conduct pay or deferred pay, or of service towards good conduct pay or pension on discharge, or of any military decoration or reward; discharge with ignominy; and in the case of N. C. O.'s any reduction, may be joined with any other legal award.

A.A. 68 (1) The term of imprisonment is limited strictly to two years, whether under one or more sentences, and a sentence of P. S. or imprisonment, whether the sentence has been revised or not, and whether the prisoner is already undergoing sentence or not, commences on the day on which the President signs the original proceedings. Therefore such a punishment cannot be awarded to commence at the expiration of a previous sentence.

Supposing, therefore, a court desires to impose a fresh sentence of imprisonment, say 98 days, on a prisoner already under a sentence of 84 days imprisonment, the court must impose a sentence of 182 days, and similarly with respect to a sentence of P. S. All sentences of imprisonment are to be specified in days.

No restriction is made on the possible duration of a sentence of P. S., but it must not be for less than five years.

RULES AS TO SUMMARY PUNISHMENT.

Summary punishment, which may be awarded by any C. M., can only be inflicted on active service for an "aggravated offence of drunkenness," for disgraceful conduct, or for any offences punishable with death or P. S.; but such a punishment is not to be inflicted if the "confirming officer is of opinion that imprisonment can with due regard to the public service be carried into execution." A.A. 44(5, 6)

On active service therefore a sentence of death or P. S. may be commuted to summary punishment, and a sentence of summary punishment to imprisonment with or without H. L.

No summary punishment is to be inflicted on a N. C. O., or upon a reduced N. C. O. for any offence committed while holding the rank of N. C. O.

The offence of "aggravated offence of drunkenness" has already been defined on p. 14.

An offence of "disgraceful conduct" means any offence specified in A.A., Section 18 (see Chap. X.), and no other.

The following are the summary punishments which may be awarded, their duration being limited to three months:—

(*a.*) Field imprisonment, No. 1; or,

(*b.*) Field imprisonment, No. 2.

(*a.*) When sentenced to *field imprisonment No.* 1 an offender may be kept in irons (fetters, handcuffs), or fettered with straps or ropes in lieu of irons, and secured so as to prevent his escape.

While under sentence he is subject to such labour and restraint as are usual in sentences of H. L.

For 21 days of the sentence, he may be attached in a fixed position to a fixed object, provided that he be not so attached for more than two hours in one day, or for more than three out of four consecutive days.

(*b.*) *Field Imprisonment No.* 2 is the same as the above except the attaching to a fixed object.

The punishment must not cause injury or leave any

permanent mark, and must be discontinued if considered prejudicial to the offender's health and reported against by a medical officer.

JURISDICTION OF COURTS MARTIAL.

A G. C. M. is competent to try *any* person subject to military law, and all classes of offences, and to award *any* punishment permitted by the Act.

A.A. 48, 49, 55. A commissioned officer can only be tried by a G. C. M., Field G. C. M., or S. C. M.

A Field G. C. M., and a S. C. M. if of three officers, have the same powers as a G. C. M., and these are the only courts which can award death or P. S.

A.A. 48, (6) A D. C. M. cannot try an officer, but it can try any other person subject to military law and award any authorized punishment, except death or P. S.

A.A. 47 (5) 182(1)184(2) A R. C. M. cannot try officers, warrant officers, nor any person not belonging to H. M. forces. It can only try N. C. O's and soldiers.

This court cannot award death, P. S., discharge with ignominy, nor forfeiture of any good conduct pay, service towards pension, nor of any military decoration or reward.

The term of imprisonment it can inflict is limited to 42 days.

The only offences which come under the jurisdiction of a R. C. M., without special sanction of superior authority, are given in Chapter IV, page 34.

Q.R. VI. 64, 66. An offence punishable with death or P. S. should not be disposed of by a D. C. M. (or R. C. M.), except under the orders of an officer who has power to convene a G. C. M., but the non-observance of this rule does not invalidate the trial, and in case of emergency inferior courts may be assembled for the trial of such offences, the circumstances being at once reported.

A.A. 41 (6) Any person subject to military law in H. M. dominions may be tried by a competent Civil Court for any offence

for which he would be triable if not subject to military law. But the Act gives absolute jurisdiction to C. M. to consider civil offences as offences against military law, and consequently a C. M., (provided the jurisdiction of civil courts is not interfered with), can try any person subject to military law for *any* civil offence, except for treason, murder, manslaughter, treason-felony, or rape committed in the U. K.: and a C. M. shall not try any of these offences committed within H. M. dominions other than the U. K. and Gibraltar, unless committed when on active service, or in a place which is more than one hundred miles, as measured in a straight line, from any town in which the offender can be tried by a competent civil court. A.A. 41.

When C. M. try civil offences the punishments awarded must be in pursuance of Sec. 40 of the Act for conduct etc., to the prejudice of good order and military discipline, or they must be in accordance with the usages of the Law of the Land, and the court can award the same punishment as may be awarded by a civil court for the offence.

A person subject to military law who has been acquitted or convicted of an offence by a competent civil court, or by a C. M., or if he has been dealt with summarily by his C. O., is not liable to be tried again by C. M. or punished by the C. O. for the same offence. A.A.46 (7) 157, 162 (6)

A person subject to Military Law is not, however, exempted from the Civil Law by reason of his military status and he is liable to be proceeded against by the ordinary course of law after conviction or punishment by a military tribunal. The Act however specifies that in awarding punishment a civil court must have regard to any previous military punishment the offender may have undergone; but this does not extend to reduction or dismissal which can be inflicted without trial. A.A.162(1,2)

All offences against the criminal code of the country committed by persons subject to military law are to be at once notified by the C. O. to the police for punishment by the civil tribunals. Section 162 of the Act prescribes A.A. 162.

certain penalties for officers who in any way obstruct or neglect to assist constables in apprehending any such offenders.

Q.R.VI. 71. It is prescribed that, as a general rule, unless there are peculiarly complicated circumstances in connection with the case, the crime of theft from a comrade should be dealt with by C. M. instead of by the civil power.

A.A.158 (1) A person who commits a military offence while subject to military law may be taken into military custody and tried any time within *three months* after he, or the corps to which he belongs, may have ceased to be subject to military law,—except for mutiny, desertion or fraudulent enlistment, for which offences he may be tried at *any* time. But this rule does not affect the jurisdiction of a Civil Court in case of any offence triable by such court as well as by C. M. Also if the offender is discharged or A.A.158 (2) dismissed from H. M. service and is also sentenced to P. S. or imprisonment, he remains subject to the Act during the term of his sentence.

The above rule is very necessary as a soldier repeatedly changes his status from soldier to civilian and from civilian to soldier. In the Regular Forces this change takes place when a soldier is transferred to the reserve, and when he is called back to the ranks from the reserve. A Militiaman is, as a rule, only for a short time in every year under military law, and returns again to civil life. The Volunteers too frequently change their status.

Military law is not local like civil law, and an offender A.A.159. may be tried by C. M. for an offence at any place, either within or without H. M. dominions, which is within the jurisdiction of an officer authorised to convene G. C. M., just as if the offence had been committed where the trial takes place and the offender were under the command of the convening officer; but the punishment inflicted by A. A. 160. such C. M. must not be greater than could have been awarded had the offender been tried where the offence was committed.

And further, the Q. R. give power to officers commanding

districts to convene C. M. at any place within their commands other than where the prisoner is serving if it be more convenient to do so. If a change to any other place outside their command seems advisable, such as the saving of expense owing to transit of witnesses or members, application would be made for the purpose. When the case is tried in another command, the court will be convened under the orders and on the responsibility of the General Officer to whose command the prisoner is removed. No change of place is to be made however if the prisoner is likely to be prejudiced in his defence by the change. Q.R.VI.79.

Sec. 159 is contrary to the usual Law of the land as it empowers C. M. to take cognizance of crimes not committed in the place where the trial is held. Civil offences are local and can only be tried by a court sitting in the district where the crime was committed unless specially provided by Act of Parliament. It must be remembered that military law operates against offenders, not as inhabitants of any particular district, but as soldiers of H. M. service.

No offences can be tried or punished by C. M. if committed more than three years before the date at which the trial begins, except offences of: (1.) *Mutiny*, (2) *desertion, or* (3) *fraudulent enlistment.* With respect to desertion and fraudulent enlistment however, if a soldier has served continuously in an exemplary manner (*i.e.*, if he has had no entry in his Regimental defaulter sheet) for three years in the regular forces, he cannot be tried for any previous offence, unless he deserted on active service, *i.e.*, unless he has been guilty of one of the greatest crimes of which a soldier can be guilty. But in the case of fraudulent enlistment all service prior to such enlistment is forfeited. A.A.161. Q.R. VI.37.

Thus the only two offences for which a soldier is always liable to trial after the expiration of *any* period of time are mutiny, and desertion on active service.

The above does not affect the jurisdiction of a civil court for an offence triable by such court as well as by C. M.

A civilian who is a deserter may be taken into custody and tried at any time.

Thus it is seen that for persons serving continuously (as officers and soldiers of the regular forces, militia officers, etc.) the limit within which an offender can be tried is *three years* from date of offence, with the above exceptions; for persons sometimes soldiers and sometimes civilians (as N. C. O.'s and men of auxiliary forces) the limit is *three months*.

A. A. 186. Q.R.VI.74. Military C. M. have no jurisdiction on board H. M. ships in commission (see Chap. IV., p. 42.)

A.A. 188. On board ship not in commission the Act applies as if persons were on land, and the officer in command may convene and confirm a R. C. M. no matter what his rank, except that if a person be tried and sentenced while on board ship, any finding and sentence of the C. M., so far as not confirmed and executed on board ship, may be confirmed and executed as if tried at the port of disembarkation.

A.A. 47.

A subaltern therefore can convene a R. C. M. on board such a ship, but *no where else*.

The only other C. M. a subaltern can convene, under any circumstances, are Field G. C. M. and S. C. M.

There is no regular appeal against the decision of a C. M. to a higher description of court, though a soldier, if he thinks himself wronged in any matter, can complain in the usual manner (vide p. 32.)

A.A.127. A C. M. is governed as respects the conduct of its proceedings, the reception or rejection of evidence, or any other matter whatsoever by English Law *only*, and no C. M. is subject to any Act, law, or ordinance of any legislature whatsoever other than the Parliament of the United Kingdom.

CHAPTER VI.

PROCEEDINGS BEFORE TRIAL.

When the complaint preferred against an officer or soldier does not admit of explanation, or is not summarily disposed of, the offender is placed under arrest or in confinement, if not done previously, for the purpose of bringing him to trial by C. M.

In the case of a N. C. O. or soldier, if the case is one which can be tried by R. C. M., the C. O. may assemble a R. C. M. under his own authority if the offence does not appear to require more serious notice. But if the C. O. considers the case sufficiently serious he has the "summary of evidence" prepared as prescribed in Chapter IV, page 45. R. P. 5.

The Adjutant would, as a rule, be the officer deputed by the C. O. to draw up the summary of evidence. He prepares the charges and application for a C. M. on the proper Army Forms, fills in the summary of evidence, inserts the name of the officer who investigated the case and that of the officer detailed to prove former convictions, fills in the descriptive return of the prisoner (except his general character), and extracts of former convictions from the C. M. and regimental defaulter sheets.

If the prisoner declines to give the substance of his defence it is recorded as "The prisoner reserves his defence."

The application is then sent with the prisoner to the Medical officer in charge who, after examination, fills in the "Surgeon's Certificate."

The C. O. then signs the document on the first page, and in his own handwriting fills in and signs the prisoner's general character on the second page. (This character is founded on the report of the officer commanding the prisoner's company and on the regimental records).

R. P. 9. A "charge" means an accusation against a person amenable to military law for having been guilty of an offence. The charge or charges are entered on a separate sheet called a "charge sheet" which should contain the whole issue or issues to be tried by the C. M. It is signed by the C. O.

In every case a specific charge must be preferred against the prisoner and C. O's are prohibited from giving in vague charges against any one with a view to screen him from the legitimate consequences of his offence.

The application containing the description of court, G. C. M. or D. C. M., it is desired to try the prisoner by, accompanied by the separate charge sheet when duly filled up and signed by the C. O., are then forwarded to the officer authorized to convene the court addressed to his staff officer, *i. e.* Brigade Major, or Assistant Adjutant General, as the case may be.

Q.R.VI.63. The convening officer may either refer the case to a superior officer, convene the higher court, or order the prisoner to be tried by a lower court than that applied for, or direct the case to be disposed of by the C. O. If he approves of the trial by the higher court he notes the same on the application and charge sheet, which are sent to the President of the court who subsequently returns them loose to the convening officer with the proceedings on conclusion of the trial.

Although the charges are framed by the C. O. who investigated the offence, they are liable to revision by the convening officer. If there be a J. A., he revises the charges for a G. C. M. or D. C. M.

All charges preferred against an officer or soldier, and the circumstances on which they are founded, are carefully examined by the convening officer, and the evidence should be in his opinion sufficiently conclusive to justify the arraignment of the accused before a C. M. The officer ordering the trial is enjoined to be careful to avoid any expression of opinion as to the guilt or innocence of the prisoner. He has first to investigate the charges in their broad bearings and is responsible that the charges are valid and within the cognisance of the court, and that the case is a proper one to be tried by the description of court he proposes to convene. Q.R.VI.76.

Before convening a C. M. he must first satisfy himself that the charges are for offences within the meaning of the Act and that the evidence justifies a trial on those charges and, if not so satisfied, he orders the release of the prisoner or refers the case to superior authority. R.P. 17

The evidence must always be sufficiently conclusive to justify the arraignment; no one should be tried on the chance of getting a conviction except under perfectly unavoidable circumstances, or when it is advisable to set an example or to clear a man's character.

The Q. R. prescribe that convening officers, in deciding on the description of court to be assembled, must bear in mind that the powers of D. C. M. are ample for the maintenace of discipline among N. C. O's and privates and that there are few crimes which cannot therefore be effectually dealt with by a D. C. M. The higher tribunal of a G. C. M. should therefore not be resorted to except in aggravated offences for which the more severe punishment of P. S. or death can be awarded; but should the state of discipline in a district or corps render a serious example expedient, or should the offender bear a bad character and a severe punishment be required, a G. C. M. would very properly be held. On the other hand, if the offender bears a good character, or is a young soldier, and has acted presumably in ignorance of the serious obligations of discipline, or without premeditation, or under provocation, the lower tribunal of a R. C. M. may be sufficient. Q.R.VI.69.

Q.R.VI.77. When a soldier is to be arraigned on a serious charge, and charges for minor offences are pending against him, or the circumstances of the serious offence disclose minor offences, the convening officer uses his discretion in striking out any minor offence and directing that it is not to be proceeded with; and as a rule no charge should be brought to trial as an addition to a serious charge if it would not otherwise have been tried by C. M.

For instance, a soldier ought not to be charged with two such charges as the following:—Having been drunk on parade, and for his rifle having been dirty on that parade; nor for Desertion and for being improperly dressed, being in plain clothes. For if acquitted on the important crime, and yet found guilty on the trifling fault, the court could hardly award a punishment, since but for the fact of the soldier having been accused of the other crime he would never have been sent for trial before a C. M. at all.

Charges of G. C. M. in the U. K. together with the evidence are submitted to the J. A. G. who has to decide whether they are properly framed, cognisable by the court, etc.

The advisability of this is doubtful, for the duty of the J. A. G. of investigating the charges is incompatible with his duty of ultimate referee as to the legality of the charges and of the whole proceedings, he being the ultimate court of appeal both in points of law and sufficiency of evidence. It would seem more correct if this duty were performed by the Adjutant General's Department.

FRAMING CHARGES.

R.P. 9. A charge sheet contains the whole of the issue or issues to be tried by C. M. at one time, and it may contain one charge or several charges.

A prisoner may be placed on his trial and charged at the same time for several offences of distinct natures, (this differs from the civil practice), but each offence must form a separate charge and separate charges must on no account be blended in one and the same charge.

But in those cases where civil offences are tried by C. M. the court can only try one offence at a time, for it is then acting as a civil court and would be guided by the customs of such courts.

Every charge sheet is headed with the name and description of the person charged, *i.e.*, it contains the name, regimental number if a soldier, rank, and corps (if any), and if he does not belong to the regular forces it should show by the description of him or directly by an express averment that he is amenable to military law in respect of the offence charged. R.P.10.

A soldier holding acting rank is arraigned in his acting rank, but a soldier holding an appointment is arraigned in his army rank with his appointment also designated. In cases were a man has had several *alias'* it has been ruled that, where the identity of a prisoner fully and indisputably appears, it is quite immaterial whether he is tried by his real name or by a fictitious name, or by two or more names; but the name in which a soldier is attested should always be entered.

Each charge should state one offence only, and in no case should an offence be described in the alternative in the same charge. R. P.11.

Each charge is divided into two parts:—

(1.) The statement of the *offence*; and,

(2.) The statement of the *particulars* of the act, neglect, or omission constituting the offence.

(1.) *The statement of the offence* should, if not a civil offence, be made in the very words of the Act. The first Appendix to the R. P. give all the offences in proper form and need only be copied.

In these forms two or more words are sometimes bracketed together one under the other, as for instance:—

Striking Using violence to Offering violence to	}	his superior officer, being in the execution of his office.

A.A.8, 17.

Here the particular word or expression should be used which most accurately describes the offence. But where the officer framing the charge is doubtful which expression best describes the offence, he may frame two or more alternative charges, each charge containing *one* of the words or expressions.

When, however, two or more such expressions when coupled together with the word "and" most accurately describe the offence this may be done, but two or more such expressions should never be coupled together with the word "or."

For instance under Sec. 24:—

A.A.24.(1) Making away with by { pawning / selling } / Being concerned in / Making away with by { destruction (*otherwise*) } { his arms. / his ammunition. / his equipments. / his instruments. / his clothing. / his regimental necessaries. / a horse of which he had charge. }

A man may be charged with "making away with by pawning his arms, ammunition *and* necessaries," but it would be wrong to charge him with "making away with .....his arms, ammunition *or* necessaries.

But of course he cannot be charged in the same charge with "making away with by pawning *and* selling," as these are two distinct offences each of which should appear in a separate charge.

To frame charges so as to include two offences in this way is called framing charges "in the disjunctive." In 1867 a storekeeper was convicted and imprisoned for "embezzling or fraudulently misapplying." The Queen's Bench released him "because the charge and conviction were in the alternative, without any certainty as to either of the two charges in the disjunctive."

But he may be tried on alternative charges when they refer distinctly to the same offence. Thus one charge may be framed "making away with by pawning" and another "making away with by selling."

Of course the court can only convict on one of several alternative charges, as the prisoner cannot be guilty of more than one.

The articles deficient must be enumerated at length but their value need not be stated if it be laid down by regulation.

(2.) The statement of the *offence* in each charge is fol-

lowed by *the statement of particulars*, commencing with the words "in that he" followed by the past tense, or "in having" followed by the past participle.

The "particulars" should state such circumstances respecting the offence as will enable the accused to know what it is intended to prove against him. R.P. II.

In the case of several charges the particulars in one charge may refer to the particulars in another; as "in having done the acts alleged in the particulars to the first charge," or "in that at the place and time aforesaid he was deficient in the necessaries above mentioned in the second charge which it was his duty to have."

If acquitted on one charge and not on another the record of conviction must set out in full all the particulars.

The statement of particulars should specify all the ingredients necessary to constitute the offence; for example, if the charge is under Sec. 9 (2) for disobeying a lawful command, the "particulars" must state the command, and show how it was given, and also how it was disobeyed; while if the charge is under Sec. 9 (1) the "particulars" should also show how the command was given personally, and how the prisoner showed wilful defiance of authority.

A general description of the place where the offence was committed should also be given, such as the station or town or "the line of march," and if it is material to the charge and is known, the exact place. If not known the prepositions "near" or "between" may be used.

When the offence consists of "words used," the words must be set out at length, and as accurately as possible. At the end of them it is usual to insert "or words to that effect."

The date at which the offence was committed must also be stated. If not exactly known the expression "on or about" a particular day or time is used, but this must never be done where the time is of the essence of the offence; as, for example, the case of absence without leave, or being drunk on a post. In some cases the offence

can be most accurately stated as having been committed "between" two days or two times, as in the case of absence without leave or of quitting a post; this may also be done when the exact day or time is not known.

But such words should only be used when the exact place or time are unknown or clearly unimportant, or unless the word "between" is the most accurate expression of the place or time.

R.P. 11. There must be added at the end of the "particulars" a statement of any expenses, loss, or damage, in respect of which the C. M. will be asked to award deduction from A.A.137,138. pay as compensation, under A. A. Sec. 137 or 138. For A. A. 13. example, in the case of a charge of fraudulent enlistment, A. A. 13, an averment may be added to the effect that the prisoner thereby obtained a free kit, value — pounds.

A. A. 10. So also under A. A. 10 (2) or (3), offering violence or resisting an escort, that the prisoner thereby damaged A. B's coat to the value of — shillings, and C. D's watch to the value of — shillings; and other statements may be made according to the facts.

If however the expenses, loss, or damage, were caused by an act or omission which constitutes another offence separately specified in the Act, it must form a separate charge; as, for instance, if a man deserts and is deficient of his regimental necessaries, he should be charged in a separate charge for loss by neglect of his necessaries.

Where a prisoner is charged with any loss or damage, the amount of such loss must appear in the charge and be proved in evidence, except with respect to articles of kit, necessaries, arms, etc., the prices of which are fixed by regulation when the price does not appear. In the case of loss or damage to clothing, great coats, or articles of which the regulation value depends upon the length of time in wear, the time such article has been in wear must be proved in evidence the value appearing in the charge. In the case of the loss of a medal, the value of the medal is also stated. The prisoner would be sentenced to make good the value of the medal, and such sum is credited to

the public but the medal is not replaced except under special circumstances to be determined by the C. in C. with the concurrence of the S. of S. for War.

A charge sheet is not invalid by reason of any mistake in the name or description of the person charged if he does not object to the charge sheet during trial and it is not shown that injustice has been done him. R.P.19.

But great care must be taken not to omit words essential to the constitution of the offence. For instance, under A. A. 17, misapplying money or goods must be framed "*fraudulently* misapplying," and under A. A. 18 maiming himself must be "*wilfully* maiming," receiving stoled goods must be "receiving *knowing them to be stolen.*" So in the case of absence, A. A. 15, it must be "absenting himself *without leave.*" The omission of such words as fraudulently, wilfully, without leave, etc., deprive the charge of its very essence and does not without them constitute an offence against military law. A.A.17. A. A. 18. A.A.15.

So also care must be taken not to insert anything on the charge sheet which is not likely to be supported by the evidence.

There is no particular section in the Act for forgery, but it could be tried under Section 18 (5) as an offence of a fraudulent nature, and it must be "forgery *with intention to defraud.*" Writing another man's name is not forgery unless with such intention.

When money is in question, the lump sum may be stated, there is no need to distinguish the amount in gold, notes, etc.

Crimes under Secs. 6, 8, 9, 12, are punishable more severely on active service than at other times, therefore the words "active service" should not be omitted if the crime was committed then. So also under Sec. 13 punishments may be severer for a second or subsequent offences than for the first offence, this should appear in the charge.

If the offence is a civil offence, or is one not expressly referred to in the Act, it would be tried under A. A. Sec.

40, or under Sec. 41 in the case of treason, murder, etc.

A.A. 40 (1)

An Act Conduct Disorder Neglect	}	to the prejudice of good order and military discipline.

In the case of a civil offence, the particulars must be stated in such words as sufficiently describe the offence, but not necessarily in technical words as charges brought before a C. M. are not bound to the technical formalities which prevail in other Courts of Law, but they should be sufficiently specific to enable the prisoner to know what he has to answer, and to enable the court to know what they are called upon to inquire into.

Charges may be amended or fresh charges added at any time before the prisoner is *arraigned*, due notice being given to the prisoner.

The following is an illustration of a complete charge sheet with statement of offences and particulars :—

CHARGE SHEET.

Description of prisoner. The prisoner, No. 153, private Thomas Atkins, Royal Warwickshire Regiment, a soldier of the regular forces, is charged with :—

First charge. First, *Using threatening language to his superior officer*—

in that

at Budbrook Barracks, Warwick, on the 20th June, 1881, he said to Sergeant William Robinson, his superior officer, "I will punch your head," or words to that effect.

Second charge. Secondly, *Resisting an escort whose duty it was to have him in charge*—

in that

at the place and on the day mentioned in the first charge he kicked Drummer James Burn, of the Royal Warwickshire Regiment, who was taking him into confinement, and thereby damaged a watch and chain of the said James Burn to the amount of 5s.

PRISONER'S PREPARATION FOR DEFENCE.

R.P. 13. The prisoner for whose trial a C. M. has been ordered

to assemble is to be afforded proper opportunity of preparing his defence, and is allowed free communication with his witnesses and with any friend or legal adviser whom he may wish to consult before and during the trial (*i.e.* not in court but between its sittings), but he must demand to do so otherwise he has no excuse.

Should the prisoner require it the Adjutant must supply him with writing materials to enable him to prepare his defence.

The C. O. of the prisoner is responsible that he is informed by an officer of every charge on which he is to be tried, and he is furnished with a copy of the charge sheet. He must also be informed that, on giving the names of any witnesses he desires to call in his defence, reasonable steps will be taken for procuring their attendance. This information should be given, in the case of a R. C. M. not less than 18, and in the case of any other C. M. not less 24 hours before his arraignment. R.P. 11.

Where the prisoner is a soldier the charges should, if necessary, be explained to him and, if he is illiterate, read to him.

The prisoner need not divulge who his witnesses are to be, and if he does name any he is not confined to the list he names, but the court *need not* adjourn to enable him to summon witnesses whom he might have called at first; and it rests with the prisoner to secure the attendance of any witnesses for whose attendance he does not request steps to be taken. R.P. 76

A list of the names, rank, and corps (if any), of the President and officers who are to form the court, and of officers in waiting (if any), is to be delivered to the prisoner *if he desires it* as soon as these officers are detailed. R.P.11.

Any non-compliance with these rules does not invalidate the trial, but if the court think the prisoner is liable to be prejudiced thereby they may adjourn for any omission to be rectified.

A copy of the summary of evidence is in practice al- R.P. 5

R.P. 74. ways given to the prisoner (see p. 46): but the prosecutor is not bound to call all the witnesses named therein, though he should ordinarily call those the prisoner desires to be called in order that he may cross-examine them.

R.P. 75. If the prosecutor intends to call a witness whose evidence is not contained in the 'summary,' notice must be given to the prisoner a reasonable time before the witness is called. If such witness is called without notice being given the court informs the prisoner of his right to demand an adjournment, when they may adjourn after taking the evidence.

R.P. 15. Any number of prisoners may be tried together for an offence committed collectively, but notice to this effect must be given to each prisoner at the time he is informed of the charge; and any prisoner may claim, either by notice to the convening officer, or when arraigned by notice to the court, to be tried separately on the ground that the evidence of one or more of the other prisoners to be tried with him will be material to his defence. Such claim is allowed if the evidence is material and if the nature of the charge admits of it.

ORDER FOR THE ASSEMBLY OF THE COURT.

R.P. 16. No unnecessary delay should take place before a C. M. is ordered to assemble. It is directed that a R. C. M. should be convened as soon as practicable after the investigation of the case by the C. O., having regard to R. P. 14, p. 75.

R.P. 17. If more than 15 days in the U. K., or more than 30 elsewhere, elapse between the time when an officer having power to convene a G. C. M. or D. C. M. receives an application for a C. M. and the date at which the case is disposed of, either by the assembly of a C. M. or otherwise, the officer has to report the case and the reasons for the delay to the C. in C.

G. C. M. and D. C. M. are assembled by an order of an officer duly authorized on that behalf. This order specifies the description of court, the purpose of its as-

sembly, fixes the date time and place of meeting, and appoints the President and Prosecutor by name, and appoints or details the other officers, though their names need not be given. It is usual to order each brigade or corps to furnish so many field officers, captains or subalterns as the case may be, and any number of waiting members as may be required.

The order then names the J. A., if any, and states to whom the proceedings are to be forwarded, followed by any opinion of the convening officer such as when a F. O. is not available as President, &c.

In orders for the assembly of R. C. M. all the officers to form the court are mentioned by name equally with the President.

Forms for the assembly of C. M. are given in R. P. Second Appendix, Nos. 1–5.

The convening officer sends the President the original charge sheet on which the prisoner is to be tried, and the summary of evidence. R.P. 17.

On G. C. M. at all times, and on minor courts when there is a prospect of protracted proceedings, it is desirable that a number exceeding that legally required should be detailed as members to guard against the inconvenience which might arise from the sickness or death of a member. The additional members (from 2 to 4) take part in all the proceedings. One or more officers are sometimes detailed in waiting to provide for casualties on first assembly, or for the case of challenge being allowed. Q.R.VI.85.

C. M. duty is classified after "Regimental duties under arms," and it is directed that in all duties the roster is to commence from the senior downwards, and in the order of classification. This precludes the possibility without a glaring breach of the express orders of the Sovereign of selecting or "packing" a C. M. Q.R.VIII.2. Q.R.VIII. 1, 3.

In large garrisons F. O.'s are usually placed on a roster for Presidents of D. C. M., in small ones F. O.'s and captains.

Attendance at a C. M., the members of which have been assembled and sworn, is reckoned a duty, even though the court be then dissolved without trying any person. Q.R.VIII.4.

Should the court be "packed," *i.e.*, individual members

nominated not according to roster, the prisoner may complain that the court is not appointed according to regulation, and this plea, if well founded, would be valid, for to pack a court involves the legality of the trial.

The convening officer when referred to may say that he required such and such officers for other special duties, &c., and, if such be really the case, the prisoner's objection does not hold good.

R.P. 102. Where it appears to the convening officer, or to the senior officer on the spot, that military exigencies or the necessities of discipline render it impossible or inexpedient to observe any of the rules as to getting a summary of evidence and furnishing a prisoner with lists of witnesses and members, copy of charge sheet, &c. R. P. 5 (p. 45), 8 (p. 46), 13 (p 75), 14 (p. 75), he may declare such to be the case, and the trial will be valid; provided that the prisoner has full opportunity of making his defence, and is afforded every practicable facility for preparing it. Such a declaration is annexed to the proceedings.

The form of Declaration is given in R. P. Second Appendix, No. 6.

SUMMONING WITNESSES.

A.A. 125. Every person required to give evidence before a C. M. may be summoned or ordered to attend.

The presence of civilians is secured by means of a legal summons (for form see R. P. Second Appendix); military witnesses are ordered to attend.

Summonses may be issued under the hand of the Convening Officer, the President, the J. A., or the prisoner's C. O.

The form of summons to a civil witness must be served in person and in reasonable time before the assembling of the court. The summons must be delivered personally, either by a N. C. O. or a policeman to the person *himself*; it is not sufficient, for instance to give it to a wife for her husband.

Summonses are always prepared in duplicate; one is given and the other retained by the server, with a note on it of the place and date when it was served, this being inserted at the time.

If the witness is at a distance, the summons would be sent to the nearest military station, or to the civil authorities.

Civil witnesses during attendance, and in going and return-

ing, have the same privilege from arrest as if before a Superior Civil Court, *i. e.*, from arrest on civil process for debt, etc., but not from arrest on a criminal charge.

If civil witnesses, not subject to military law, after payment of their expenses, make default in attending the President may certify the offence committed to a court of law which has power to punish witnesses if guilty of like offences in that court, and such court may punish the witness as if the offence had been committed before it. A.A.126.

The Convening Officer, or, after the assembly of the court, the President, take the proper steps to procure the attendance of the witnesses whom the prosecutor or prisoner desires to call, and whose attendance can be reasonably procured, but the person requiring the attendance of a witness may be required to undertake to defray the cost. R.P.77.

When an officer or soldier required as a witness belongs to a regiment in the district in which the C. M. is to be held, application is usually made to the witness' C. O. by the C. O. of the prisoner's regiment, requesting his attendance and naming the probable day of assembly of the Court. When such a witness is not serving in the district application is made to the General commanding the district in which the witness is serving naming the probable day of assembly. Q.R.VI.80.

Should any person subject to military law when ordered to attend make default in attending he is liable to be tried by C. M., other than the court before whom the offence is committed. A.A. 28,

No one can claim exemption from a summons except the Sovereign, and after being duly summoned as a witness there is no exemption from attendance.

It has been ruled that not even Governors of Colonies, C.'s in C., or Convening Officers, are exempt from being summoned as witnesses, and all, if summoned, are bound to attend; but they are not bound to disclose matters connected with their governments or commands.

In 1837 a circular was issued on this subject but, owing to the C. in C. in India being summoned unnecessarily, an extra provision was inserted that any officer or soldier so doing is liable to be tried for vexatiously summoning the C. O. of troops.

Any person present in court may be summoned as a witness then and there without notice (as far as the witness is concerned.) Thus, the officers of the court are not precluded from being witnesses for or against the prisoner, though it is advisable that, as far as possible, they should be totally unconnected with the case; also, if possible, no officer who is to be called as a witness should act as prosecutor.

A discretionary power as to the summoning of witnesses must necessarily rest with the convening officer. He may dispense with the summoning of witnesses and withhold the summons if they are at great distances or not likely to be of use. The court can, however, rectify any omission subsequently by adjourning until the necessary witnesses have been summoned; and care has to be taken, in refusing to summon witnesses, that the prisoner does not thereby suffer any material harm.

If the proper steps for procuring the attendance of
R.P. 78. material witnesses have not been taken, or if witnesses are not present, the court adjourns and report to the convening officer.

In military courts the expenses of procuring the attendance of witnesses are generally paid for by the public, and the president has to certify that the claims of the witnesses are just and reasonable; but if many witnesses are asked for and the expenses heavy, the prisoner (or prosecutor) may be required to pay the expenses. Officers summoned as witnesses for the defence of an officer are not paid if the latter is found guilty. No expenses are allowed to persons living in the place where the C. M. is sitting.

In civil courts prisoners have always to summon their witnesses at their own responsibility and expense.

DUTIES OF ADJUTANT DURING SITTING OF COURT.

On the morning of each day the court is ordered to sit the Adjutant has the prisoner medically examined by the
Q.R.VI.89. medical officer, and C. O.'s are held responsible that no prisoner is brought before a C. M. who in the opinion of the medical officer is unfit to undergo his trial. In the

event of illness of the prisoner preventing trial the Adjutant must at once notify the convening officer for the court to be postponed.

Officers and warrant officers are exempt from medical examination previous to trial.

Prisoners are brought before a C. M. attended by an officer or N. C. O. having them in custody, or by an escort. The officer or N. C. O. in charge is responsible for their safe conduct, but must obey the directions of the court while the prisoner is before the court. In the case of a soldier one N. C. O. and one private usually form the escort. Q.R.VI.00.

The Adjutant also details an Orderly Sergeant to attend the court. In the case of an R. C. M. he furnishes this sergeant with the requisite stationery, Army Act, Queen's Regulations, Bible, blank Form of Proceedings, together with a certified extract from the regimental orders convening the court, or the original order. He also forwards to the President the original loose charge with order for trial thereon, at the back of which he should record that the prisoner has been warned, together with the medical officer's certificate.

In the case of D. C. M. the above documents are furnished by the staff office.

The Adjutant has the prisoner marched to the place of assembly of the court, so as to be there ten minutes before the hour named. The orderly sergeant takes the above stationery to the place of assembly of the court and sees that the room is duly prepared. In case of a D. C. M., he obtains from the staff office the list of members detailed with dates of their commissions, the order for assembly of court, charge sheet, summary of evidence, etc. He then places himself under the orders of the President, and remains so until dismissed.

CHAPTER VII.

DUTIES, RESPONSIBILITIES, &c., OF PERSONS OFFICIATING AT COURTS MARTIAL.

PRESIDENT AND MEMBERS.

So long as a C. M. does not exceed its jurisdiction no other court is competent to stay its proceedings or to revoke its sentence, but the officers of the court are collectively and individually responsible to the Supreme Courts of Civil Judicature, not only for any abuse of power but also for any illegal proceedings; but so long as the proceedings are legal all officers composing the court are exempt from proceedings at civil law for what they do or say in the discharge of their duty.

A.A.170. Any prosecution instituted against any person for any act done (or neglect in doing) in pursuance of the Act must be commenced within twelve months of the commission of the act complained of, and it can only be brought before a Court of Superior Jurisdiction.

With the exception of mere clerical corrections, C. M. have no authority to arraign a prisoner upon charges other than those submitted to them by the convening officer.

R.P. 38. At any time during the trial the court may correct any mistake in the charge sheet relative to the name or description of the prisoner. Also if it appears to the court, at any time before they have begun to examine witnesses, that any addition or alteration is required in the charge

in the interests of justice, the court may adjourn and report their opinion to the convening authority, and the latter may either direct a new trial to be commenced or amend the charge and direct the trial to proceed with such amended charge after due notice to the prisoner.

C. M. have in a separate letter animadverted on the charges submitted to them as being malicious, frivolous, vexatious, &c.; and also on causes leading to the trial. A court may also animadvert on the conduct of persons before it, and however injurious such remarks may be to character, &c., members are privileged and cannot be proceeded against for defamation of character, but any such remarks should be made in a separate letter.

The court may also be under the necessity of placing on record its grave displeasure at the language or conduct of any persons before it, as "The court is of opinion that the prosecutor's remarks are uncalled for and reprehensible."

The court may in fact take judicial notice of all matters of notoriety, including all matters within their general military knowledge. R.P. 73.

A C. M. has ordered an officer into arrest even though he was senior to every officer of the court.

The court have to stop the prosecutor if he refers to any matter not relevant to the charge, and they have to restrain any undue violence of language or want of fairness or moderation on the part of the prosecutor. But the prisoner should be allowed great latitude in making his defence; he must, however, abstain from contemptuous or disrespectful remarks towards the court and from coarse or insulting language towards others, but he may, for the purpose of his defence, impeach the evidence and motives of the prosecutor and witnesses and charge other persons with blame and even criminality, for which however he is of course liable to further proceedings. R.P. 59.

The court must not allow any statements made by the prisoner which reflect on the conduct of others or on a regiment to be refuted by the prosecutor. If they are unsupported by evidence, where they affect discipline generally and the credit of a corps, the confirming authority usually gives the assailed party the opportunity of refuting them for his satisfaction, but not in court.

The court may caution the prisoner as to the irrelevance of his defence but should not, unless in special cases, stop his defence solely on such ground.

A. A. 120. If civil witnesses not subject to Military Law (after payment of their expenses, make default in attending), refuse to take an oath legally required, or do not answer questions or produce documents which can be legally demanded; or if they or any other civilians present, including the prisoner's counsel, are refractory, cause interruption or disturbance, do not obey the injunctions of the court, or are guilty of any contempt of court, they may be removed from court, and the president may certify the offence committed to a court of law which has power to commit for contempt, and such court may punish the witness as if the offence had been committed before it.

A. A. 120.

A. A. 28. Should any person subject to military law (when ordered to attend a C. M., make default in attending,) refuse to take an oath, answer questions, produce documents, &c., legally required, or is guilty of contempt of court by using insulting or threatening language, or by causing interruption or disturbance, he is liable to be tried by C. M., other than the court before whom the offence is committed. But in case of contempt of court (as above) the C. M. may, instead of the offender being tried by another C.M., by order of the president sentence him to imprisonment with or without hard labour not exceeding 21 days.

R. P. 58. The President is responsible for the trial being conducted in proper order and in accordance with the Act, R. P. and Q. R., and he must take care that everything is conducted in a manner befitting a Court of Justice. It is his duty to see that justice is administered, and that the prisoner has a fair trial and does not suffer any disadvantage in consequence of his position as a prisoner, or of his ignorance or incapacity to examine or cross-examine witnesses; he is required in fact to hold throughout a strictly impartial position towards him and the convening officer. He is the channel of communication between

the court and the convening authority: he is responsible that every person attending the court is treated with proper respect. His powers extend not only over members, but over every body present in court whether senior to him or not. He seats the members according to rank, collects votes, &c. He summons witnesses if necessary, and where there is no J. A. he swears the members and witnesses, takes charge of the proceedings, forwards them for confirmation, sees that a proper record of the proceedings is made, and he is the recognised adviser of the court in law and procedure; in fact, besides his own particular duties, he performs those of a J. A.

If another officer administer the oaths, or write the proceedings, he does so under the president's authority and by his order.

In orders a C. M. is officially designated as the court of which so and so is president.

Courts martial, like courts of civil law, are open courts, but as by authority all votes are taken secretely, the court is from time to time cleared of all persons not sworn to secrecy (*i. e.*, except the officers of the court, J. A., and officers under instruction), and all deliberations of the court take place with closed doors. The court may either retire or may cause the place where they sit to be cleared by order of the President. A. A. 53, (5) R. P. 62.

Except as above mentioned all the proceedings including the view of any place take place in public and in the presence of the prisoner, subject however to the amount of room available and the convenience of the court and parties before it. A. A. 53. (6)

The President orders the clearing of the court for deliberation on any incidental discussion when he may deem it expedient, or at the instance of a member or the J. A.

It is competent to a C. M. to forbid the publication of a report of the trial during its continuance; and if the court notifies this to the audience and warns in writing the publishers of newspapers, such decision is binding and any offender may be proceeded against criminally in the Court of Queen's Bench.

The general practice is however to admit reporters without imposing any restriction.

R.P. 63. A C. M. may sit between the hours of 6 A. M. and 6 P. M. as may be directed, but if the court consider it necessary to continue a trial after 6 P. M. they may do so recording their reasons.

In cases requiring an immediate example, or when it is expedient, trials may be held at any hour, and even if necessary on Sundays, Christmas day, or Good Friday.

Q.R.VI.88. The Q. R. limit the hours to between 10 A. M. and 4 P. M., or 11 A. M. and 5 P. M. in the U. K., and to six hours or at most 8 hours during one day. Abroad the hours of sitting are regulated by the General commanding.

R.P. 64. When a court is once assembled and the prisoner has been arraigned the court should continue the trial from day to day as far as practicable with regularity and, as far as possible, without interruption to its conclusion,

A.A.53.(1) unless an adjournment is necessary. A court may adjourn from place to place as well as from time to time.

A court should rarely adjourn for the purpose of obtaining further evidence on behalf of the prosecution or the prisoner, unless they are satisfied that such an adjournment and evidence are necessary to assist the course of justice and are not unjust to the prisoner. Great care should therefore be taken by the prosecutor especially, and also by the prisoner, to have ready at the trial all the witnesses and documents they may desire to produce in support of their respective cases. When a C. M. is adjourned it is either adjourned till further orders, and meets again at the same place, or a specific time (and place) is named for its reassembly.

In the absence of either the President, or J. A. (if appointed), or the prisoner, a court cannot sit but must adjourn; but whatever casualties occur among the members, so long as the legal minimum remains, the trial is proceeded with a certificate of the cause of absence being attached to the proceedings; but if after the commence-

A.A.53 (1) ment of the trial the court is by death, or otherwise, reduced below the legal minimum it must be dissolved.

If the President dies or is otherwise unable to attend, and the court is not reduced below the legal minimum, the convening officer may appoint the senior member, if of sufficient rank, to be President and the trial proceeds, but if he is not of sufficient rank the court is dissolved. A. A. 53(2)

But if at a D. C. M. the senior member is a captain it is usual for the next F. O. on the roster to be appointed President, and therefore the trial begins afresh.

If, on account of the illness of the prisoner before the finding, it is impossible to continue the trial, the court is dissolved. A.A. 53(3)

In all these cases, and in any case of doubt arising, the court adjourns and a report is immediately made to the convening officer who is the authority for dissolving the court.

In case of the death of the prisoner or of such illness as renders it impossible to continue the trial, the court ascertains the fact of the death or illness by evidence, record the same and adjourn, transmitting the proceedings to the convening officer. R.P 66

Where a C. M. is dissolved before the finding, or in case of a finding of guilty before the sentence, the proceedings are null and the prisoner may be tried again before another C. M. R. P 35.

If an officer be promoted during the trial he would take his seat next day according to his new rank, except in the case of his becoming senior to the President who cannot be displaced.

The absence of any member during any part of the trial necessarily prevents his resuming his seat. R.P. 67.

No new member can be appointed after the prisoner has been arraigned.

If during the trial a new President or a new member is appointed the trial must begin afresh. In such a case it would generally be sufficient, *if the prisoner raised no objection*, that the evidence formerly given be read over to the witnesses re-sworn, and that the latter be allowed to correct their evidence and be cross-examined; but each

witness must be asked if that be his evidence, and whether he has any additions or corrections to make. For this the court and each witness have to be re-sworn.

R.P. 68. Every member of a court must give his opinion on every question which the court has to decide, and he is required to form an opinion from the evidence adduced of the prisoner's guilt or innocence on all the charges and give his vote when called upon by the President, but even though he has given his vote for an acquittal on the finding he must give his opinion as to the sentence.

In taking the votes of the court the President takes them in succession, beginning with the members junior in rank.

A.A. 51 (3) Except to disallow the prisoner's objection to the President, which is only allowed when one-third or more of the other officers concur, and to pass sentence of death when at least two-thirds must concur, all questions are determined by an absolute majority of votes.

A.A. 48 (8)

R.P. 68.

Should the court (which usually consists when sworn in of an uneven number) be reduced by death, sickness, or challenge to an even number and their votes be equally divided, the prisoner would have the benefit of having his objection allowed in the case of a challenge and the benefit of acquittal on the finding. But in the case of an equality of votes on the sentence, or on any question arising after the commencement of the trial, except the finding, the President has a second or "casting" vote which will determine the majority. This is necessary for arriving at such a conclusion as will permit the progress of the trial.

A.A. 53 (8)

A.A. 51 (5)

THE PROSECUTOR.

R.P. 24. The prosecution must be considered at the suit of the Crown, and the prosecutor must be a person subject to military law, but in no case can he be a member of the court, the J. A., or Interpreter.

It is directed that no officer is to be appointed prosecutor who is not fully competent to conduct the pro-

ceedings: in difficult cases the convening officer selects an officer specially qualified to perform the duty. Q.R.VI.80.

The office of prosecutor has never been assigned to any particular person, but he is always a commissioned officer though of any rank. Naturally the officer who originated the charge would be the proper prosecutor, namely the prisoner's C.O., but as a rule the Adjutant of the prisoner's regiment conducts the prosecution at D.C.M. or R.C.M. on behalf of the C. O. and he also proves former convictions, etc., though on important cases the C. O. himself might appear as prosecutor. At G. C. M. the convening officer generally details a staff or other competent officer to perform the duty. The prosecutor cannot be changed without the authority of the officer who appointed him.

If possible no officer who is to be called as a witness is to be appointed prosecutor, and he must not be a material witness for the defence though he may be called on by the prisoner to speak as to character. But when the prosecutor is unavoidably a witness for the prosecution he should be sworn after his opening address, if any, and give his evidence as the first witness for the prosecution, and this is the only exception to the rule that the evidence must be given by question and answer.

The prosecutor should be careful not to hold any communication with the court except in the presence and hearing of the prisoner.

The prosecutor's name appears in the record of the proceedings. If during the trial illness prevent his attendance, another officer may be appointed to perform the duty, his name being recorded. The absence of the prosecutor at any stage of the proceedings would not affect their legality.

The prosecutor wears the same dress as the court, viz: G. C. M. "Review Order;" D. C. M. "Marching Order;" R. C. M. "Drill Order." In hot climates this is modified by local order. Q.R.XII.13.

The prosecutor is not sworn *as such*, and he leaves the court whenever it is cleared. His duties are to get up the case, conduct the prosecution by bringing *all* the facts of the case before the court in evidence, to assist the court R.P. 30. Q.R.VI.84.

in the administration of justice, to behave impartially and not to take any unfair advantage of, or suppress any evidence which might tell in favour of the prisoner.

For instance, although drunkenness is no excuse for the commission of a crime, if the charges against a soldier do not allege drunkenness and he was drunk at the time he committed the offence the prosecutor should bring out this fact in evidence. If the prisoner is being tried on appeal instead of his submitting to the summary punishment of his C. O. the prosecutor informs the court of this fact.

The prosecutor furnishes the J. A. with a list of his witnesses. He examines his own witnesses by questions, cross-examines those of the defence and, when necessary, explains by addresses to the court the bearing of any particular point in evidence on the case.

In case of conviction an officer, who is not a member of the court, is sworn as a witness for the prosecution for the purpose of producing evidence as to the character and particulars of service of the prisoner, if a soldier. There is no objection to the prosecutor being this witness and he generally is.

This witness, whether he be the prosecutor or not, prepares a statement as to the prisoner's character and particulars of service, the information being obtained from the regimental books. To this statement is annexed a schedule containing all the previous convictions of the prisoner by C. M., and those by civil court having equal value.

This statement, which is taken into court, contains the number of entries in the regimental defaulter book exclusive of convictions by C. M. and by civil court of equal value (see Chapter VIII, Procedure in Civil Offences). If the charge is for drunkenness the entries for drunkenness are stated separately. The following information is then added :

Whether the prisoner is undergoing any other sentence, and the length of time he has been in confinement in re-

spect of the trial; then follow particulars as to his age, date of attestation, service allowed to reckon towards discharge or transfer to the reserve, amount of deferred pay due to him, service allowed to reckon towards pension.

If the court is a G. C. M. or D. C. M. the following is added: —

Whether the prisoner is in possession of any decoration or military reward which the court can forfeit. If the prisoner is a warrant officer, the rank he held previously. If an officer, his army and regimental rank.

On a trial for desertion the regimental books containing the record of absence without leave, deficiency of kit (if any), and declaration of the court of inquiry, or a copy thereof signed by the officer having the custody of the regimental books, must be produced.

In all cases where an original document is required for record a certified copy is produced in court together with the original for verification, the former is attached to the proceedings. Q.R.VI.91.

If the Adjutant is the prosecutor, since all the above records are in his office, he obtains the necessary copies; but if the prosecutor or witness is not the Adjutant, he has to obtain all the above documents and information from the latter, but he must verify them *himself* with the original records before he can give evidence of the facts they contain on oath; and in fact after giving the above evidence the President asks him whether the prisoner is the person named in the statement just read, whether he has compared its contents with the regimental books, and whether they are true extracts from these books.

A person not subject to military law may sometimes appear as an "informant" or "complainant" but a military prosecutor is nevertheless always detailed. The complainant would give his evidence first and then remain in court to assist the prosecutor, but he is not allowed to make any remarks unless called upon to do so.

THE PRISONER.

No proceedings in open court can take place in the absence of the prisoner whose appearance in court is always noted in the proceedings. Even though the prisoner may have been in close confinement or in irons, he has a right during his continuance in court to be unQ.R.VI.90. fettered and free from bonds or shackles of any kind, unless it is absolutely necessary for the purpose of preventing his escape or rescue, or of restraining his violent conduct.

The prisoner must be given every facility to establish his defence, and as he is often unable to place the facts before the court in a clear and intelligible light it devolves on the President to assist him therein. In some instances it may be right and proper for the Captain of the prisoner's company to assist him in preparing his defence.

The prisoner need answer no questions nor make any statement whatever which are liable to incriminate him, and it is a fundamental rule that no Judge or Court should ever interrogate the prisoner.

COUNSEL AND FRIEND OF PRISONER.

R.P. 85. At all C. M. a prisoner may have a person to assist him during the trial as his "friend" whether he be a legal adviser or any other person.

A "friend" may advise him on all points and suggest the questions to be put to witnesses, but he is not permitted to address the court or to examine witnesses orally, unless he is an officer subject to military law in which case he has the same rights and duties as "Counsel," and the right of the prisoner is limited in the same manner. Hence, unless the prisoner has Counsel or is assisted by an officer he must himself read the addresses prepared for him by his adviser and cross-examine witnesses, &c., except with special permission of the court.

A.A. 129.

R.P. 86. At G. C. M. Counsel is allowed to appear on behalf of the prosecutor and prisoner when held in the U. K., and

elsewhere if the C. in C. or convening officer declares it to be expedient. The following rules as to 'Counsel' do not refer to a 'friend' of the prisoner unless he is an officer subject to military law.

Should a prisoner intend to have Counsel to assist him at the trial he should give notice either when informed of the charge or, as a rule, not less than seven days before the trial. In every case the prosecutor should be allowed time to obtain counsel too, or the authority appointing a J. A. should have time to appoint a Counsel to act as J. A. at the trial. R.P. 87.

When the prisoner is so assisted, the prosecutor is generally allowed the aid of a lawyer also (unless a J. A. is appointed), but application has to be made for permission to incur the expense.

So also if the convening officer directs a Counsel to appear on behalf of the prosecutor a similar notice must be given to the prisoner in time.

A Counsel at a C. M. has the like obligations, and also the like rights as the prosecutor or prisoner for whom he appears, namely, to call and orally examine, cross-examine, and re-examine witnesses, to make an objection or statement, to address the court, to put in a plea, to inspect the proceedings, &c.; but then neither the prosecutor nor prisoner can do any of the above unless with the special permission of the court. R.P. 88, 89.

Also, if the court ask the Counsel *for the prisoner* any question, he may decline to answer, but he must not give to the court any information which is misleading. R.P. 87.

Counsel at a C. M. must be guided by the rules and practice of C. M. and will adhere to the rules of civil courts,and any conduct of Counsel which would be liable to censure or a contempt of court, if it took place before a High Court of Justice is the same in the case of a C. M. A.A.130

A C.M. may by order of the President cause a Counsel to be removed, in which case the President must certify the offence committed to a court of law.

R. P. 88-92.

The following are the principal rules as to Counsel :—

He should always make an opening address, and can examine the prosecutor as any ordinary witness, in which case the rule as to the prosecutor being examined first does not apply.

He is not allowed to state facts he does not intend to prove, nor may he give his personal opinion as to facts before the court, nor make assumptions as to facts not proven.

In his treatment of the court and witnesses, Counsel must have regard to the usages of military discipline.

When Counsel puts a question which is not relevant except so far as it may tend to injure the character of a witness who objects to the question, the court has to decide whether the imputation, *if true*, would *seriously* affect their opinion as to the credibility of the witness or not; if so, they would allow the question, but not otherwise.

A prisoner at the close of the case for the prosecution, and before his own Counsel speaks, can make any statement he likes orally, but he is not on oath nor liable to examination.

Neither the prosecutor nor prisoner has any right to object to a Counsel if properly qualified.

A Counsel to be qualified must be a barrister in England or Ireland, an advocate in Scotland, or elsewhere either of these or in a corresponding position.

THE JUDGE ADVOCATE.

The J. A. G. and his Deputy are always civilian lawyers, while the Deputy-Judge-Advocates, who in England attend at G. C. M., are always military men.

The J. A. G.'s Department forms a final Court of Appeal and has the power of upsetting, or "quashing" as it is called, all proceedings of C. M., and it therefore takes no part in the actual preparation, conduct, or management of prosecutions.

The J. A. G. is a member of the Privy Council. He is generally chosen from among the barristers who are members of Parliament, and they stand or fall with the Government to which they are attached.

All the proceedings of G. C. M. which at home must be confirmed by the Sovereign are sent to the J. A. G.,

and the Sovereign confirms on *his* responsibility as a Minister of the Crown, and acts on his recommendation.

The J. A. G. is responsible to Parliament, hence a prisoner, if wronged, can appeal at law against him, for "the Sovereign can do no wrong."

The duties of the J. A. G. are confined to the examination of the proceedings as to their legality, whether the sentences are within Statute Laws, &c. The expediency of carrying out the sentence, or as to remission, &c., is not his province, the C. in C. advises the Crown on these points.

A J. A. is always appointed to every G. C. M. In the U. K. the J. A. G. generally appoints one of his deputies to act for him, and he is responsible for them.

Out of the U. K. General Officers are empowered by warrant to appoint J. A.'s.

If the convening officer is authorised to appoint a J. A. he must in the case of a G. C. M., and may in the case of a D. C. M., appoint a fit person to act as J. A. R. P. 99.

Sometimes when the case before a D. C. M. is complicated and the court gets into difficulties it may adjourn and apply for a J. A. to be appointed. On his coming into court the proceedings are gone over again, and the prisoner may then revert to any questions about which he was not satisfied.

An officer who is disqualified for sitting on a C. M. is also disqualified for acting as J. A., but he *may* be called as a witness for the defence.

A C. M. is not invalid by reason of any invalidity in the appointment of the J. A. officiating thereat.

If the J. A. is unable to attend the C. M. from any cause the court adjourns, and the President reports to the convening officer. Another J. A. may then be appointed, who is sworn and acts as J. A. for the residue of the trial, or until the J. A. (previously appointed) returns. R.P. 100.

The appointment of a J. A. may at any time be revoked by the authority who made it, and another J. A. ap-

pointed without the proceedings being delayed, but a J. A. must always be present if once appointed.

The powers and duties of a J. A. are laid down in R. P. 101:

R.P. 101. (*a.*) Both the prosecutor and prisoner are *at all times* entitled to his opinion on any question of law relative to the trial, whether in or out of court, subject, in court, to its permission.

(*b.*) He represents the J. A. G.

(*c.*) He is the legal adviser of the court and has to inform the court of any informality or irregularity in the proceedings, etc. Whether consulted or not he informs the convening officer of any informality or defect in the charge or in the constitution of the court, and gives his advice on any matter before the court.

(*d.*) Any information or advice he may give before the court will, if he or the court desire it, be entered in the proceedings.

(*e.*) At the conclusion of the case he will, unless both he and the court consider it unnecessary, sum up the evidence and give his opinion upon the legal bearing of the case before the court deliberate on their finding.

(*f.*) Upon any point of law or procedure the court should be guided by his opinion and not overrule it except for very weighty reasons. The court in following his opinion may record the fact that they have done so in consequence of that opinion.

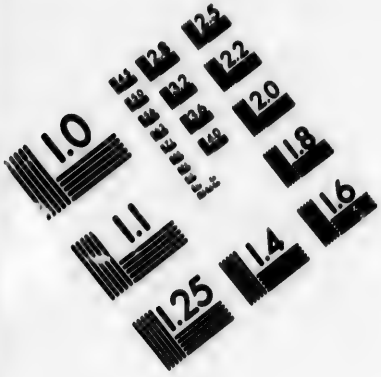
(Officers of a C. M. must however bear in mind that they are responsible for the legality of their decisions, and by acting upon the opinion of the J. A. on questions of law they they are not thereby exonerated from their responsibility, for whatever degree of deference may be due to his advice, it must be remembered that he is not responsible to any court of law for the opinion he may give.)

If a difficulty arises on a question of law, which is not settled to the satisfaction of the court by the J. A., the court may adjourn and through the President report the circumstance to the convening officer for the opinion of the J. A. G. if in the U. K., elsewhere for the opinion of the Crown legal advisers.

(*g.*) The J. A., equally with the President, has to see that the prisoner suffers no disadvantage from his position or ignorance, etc., and for that purpose, with the permission of the court, he may call and put questions to witnesses to elicit the truth.

(*h.*) He must always maintain, while taking care that all legal details are strictly observed, an impartial position.

R.P. 20. The J. A. administers the oaths first to the President



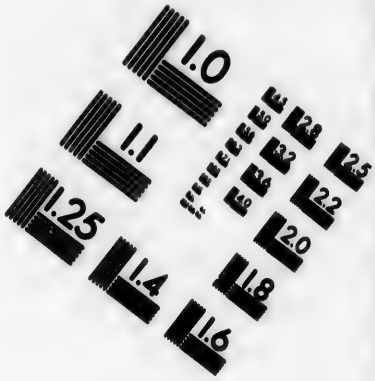
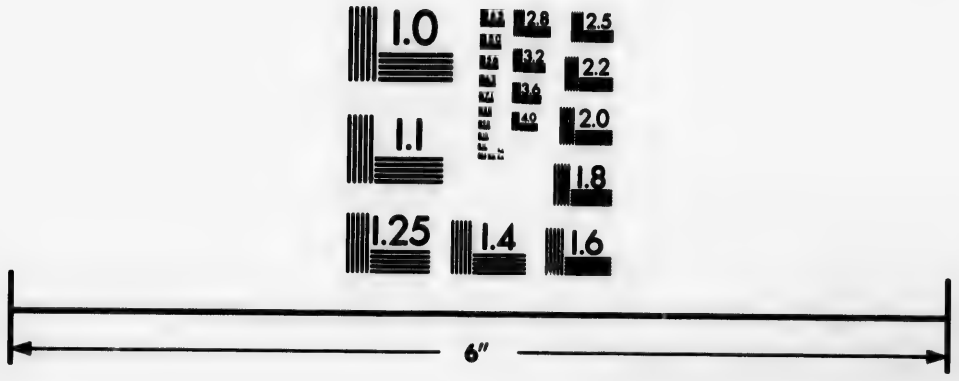
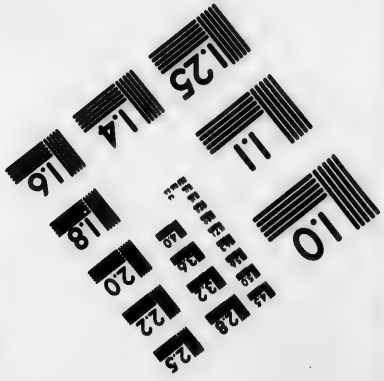


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and then to the members of the court, and he may also administer oaths to other persons present at the C. M. A vote of secrecy is also administered to the J. A. by the President, so that he may be able to attend when the court is closed for deliberation when his advice is confidential.

A J. A. cannot be objected to by the prisoner.

The J. A. is responsible for a proper record being made of the proceedings and for their accuracy; if the J. A. is called as a witness the President is then responsible for the record of his evidence. R.P. 93.

INTERPRETER AND SHORT-HAND WRITER.

At any time of the trial an impartial person may be sworn to act as interpreter if the court think it necessary, or if either the prosecutor or prisoner requests it on any reasonable ground. R.P. 71.

Also if the court think it desirable an impartial person may be sworn to act as a short-hand writer.

The prisoner must be informed of the person who is proposed to be sworn, and he may object to such person as not being impartial, and if the court consider the objection reasonable such person is not sworn.

Neither the prosecutor nor J. A. nor any other interested party can act as interpreter or short-hand writer.

A member of the court is not disqualified, but it would be attended with great inconvenience and might possibly bring him into collision with the parties if he were to act as interpreter throughout any extended proceedings.

EXAMINATION OF WITNESSES.

Witnesses are examined by question and answer; the only exception to this rule being when the prosecutor is himself a witness.

Formerly a witness was frequently directed by the prosecutor to "state what you know relative to the charge which you have heard read." This plan of allowing a witness to tell his own story often led to his stating a good

deal of hearsay or illegal evidence, and although such portions of his evidence might be rejected by the court, still they were apt to leave impressions on individual members which the admissible parts of his evidence would not have conveyed.

Witnesses should be examined separately, hence the other witnesses leave the court when not under examination; but no witness is incompetent by reason of his having been present during the evidence of another witness, although either side may request another witness to withdraw.

For this reason it is laid down that if the prosecutor is also a witness he should give his evidence first as he has to remain in court, and similarly, if the prosecutor desire a "complainant" to assist him in the examination of other witnesses such complainant has to give his own evidence first.

Witnesses may however be confronted one with another in court to clear up discrepancies, identity, etc.

R.P.79. On a discussion as to the allowance of a question, or the sufficiency of his answers, or otherwise, a witness may be directed to withdraw.

A witness, before he gives his evidence, is sworn by the J. A., President, or by a member, as follows:

A.A.52 (3)

R.P. 80.

"The evidence which you shall give before this court shall be the truth, the whole truth, and nothing but the truth. So help you God."

Whilst being sworn he removes his cap and gloves, and then, if a soldier, puts them on again. Unless sick, a witness remains standing.

R.P.30,114. A witness who objects to take an oath or is incompetent to take an oath is allowed to make a solemn declaration in lieu.

A.A.126 (2) Should civil witnesses, when examined on oath or on solemn declaration, give wilful false evidence they are liable on indictment or information to be convicted for

A.A. 29. perjury. Persons subject to military law guilty of such an offence are liable to be tried by C. M.

Witnesses may be questioned orally by the prosecutor, prisoner, or J. A. without the intervention of the court, and the witness must forthwith reply unless the question is objected to and the objection allowed by the court. R.P. 81.

A witness always addresses his reply *to the court*, and his evidence is recorded in the first person, and as nearly as possible in the witness' own words. Before he leaves the court the evidence of a witness, as taken down, is read to him. If he makes any explanation or correction the prosecutor and prisoner may respectively examine him on it.

As a rule a witness can only be examined as to facts within his own personal knowledge or observation, a mere opinion or expression of belief is not generally accepted. This does not mean that he must, in every case, have such certainty as to preclude all possibility of doubt; for absolute certainty is not necessary nor is it always obtainable, especially in cases of identity or of handwriting. A witness who falsely swears what he thinks or believes may be convicted of perjury equally as if he swore positively to that which he knows to be false.

If a question be objected to and not withdrawn, it is entered on the proceedings; and the court, after hearing the objection, decide in closed court whether it shall be put or not. In any case it must be entered on the proceedings and not expunged.

Great caution must be observed by the court as to rejecting questions put by the prisoner, as proceedings are liable to be quashed if it is considered the prisoner has not had a fair trial in consequence.

Mr. Mowbray, when J. A. G., said: "It is a matter of great importance that the prisoner on trial by C. M. should be restricted as little as possible in the examination of his own witnesses, or in the cross-examination of those called by the prosecution, as an error in this respect may invalidate the whole proceedings."

A witness is first examined by the person calling him; this examination is called the "examination-in-chief." He may then be "cross-examined" by the adverse party, R.P. 82.

after which he may be "re-examined" by the person who produced him on new matter raised in the cross-examination and to re-establish the credibility of the witness; but the court may allow the cross-examination of a witness to be postponed.

The cross-examination, which is usually directed against the accuracy and credibility of the witness, is however not limited to the matter brought forward in the "examination-in-chief" but extends over the whole case, it must however be relevant.

A witness in cross-examination may be questioned as to facts stated by other witnesses, or as to the motives which actuated him, in fact much greater latitude is allowed than in the examination-in-chief.

Any statements made in the examination-in-chief may be contradicted by evidence, but statements made in cross-examination may only be contradicted by evidence *if relevant*, not if irrevelant.

A witness once sworn may be cross-examined though he may not have been examined-in-chief.

R.P. 83. At any time before the second address of the prisoner, the J. A., also any member of the court may, with its permission, address to a witness any question he wishes through the president; but it is preferable for members of the court to reserve putting any questions till after the re-examination is concluded.

Upon any such question being answered the President then asks the witness any question relative to that answer at the request of the prosecutor or prisoner, if deemed reasonable by the court.

R.P. 84. Before the concluding address of the prisoner a witness may, by leave of the court, be recalled at the request of either side and questions put to him through the president. In special cases a witness may be called or recalled by the prosecutor for the purpose of rebutting any *material* statement made by a witness for the defence upon his examination by the prisoner on any new matter which the prosecutor could not have foreseen.

Where the prisoner has called witnesses as to character, the prosecutor, before the prisoner's second address, may call or recall witnesses for the purpose of proving a previous conviction or entries in the defaulter book against the prisoner.

The court may call or recall any witness at any time *before the finding* if they consider it necessary for the ends of justice, or to get him to explain anything obscure in his evidence. Any such correction or explanation has to be recorded separately in the proceedings; no erasures or alteration is allowed to be made in the original evidence. When so re-called either party may of course cross-examine him with regard to such question and answer.

A witness is not permitted to read his evidence, but he may refresh his memory by referring to memoranda, entries in books, &c., made by himself when he had a distinct recollection of the fact, or made by another and examined by him whilst the fact was fresh in his memory. The opposite party has a right to inspect any such papers, and may cross-examine the witness upon them, as to their origin, author, possession, &c.

A witness may decline to answer any question tending to criminate him or to subject him to a penalty. This applies also to questions which would criminate the husband or wife of the witness. He may also decline to answer any question tending to degrade him, unless the transaction as to which he is questioned is material to the point at issue in which case he is bound to answer *any* question put to him. For instance, in cross-examination when an attempt is made to impugn the character of a witness or to prove what he has said is false, he need not reply.

If the witness chooses to answer a question tending to degrade him only indirectly bearing on the charge, *i.e.* not relevant to the point at issue, the party who asks the question is bound by the answer and is not allowed to disprove it by other evidence, except in the case of the

witness denying or refusing to answer whether he has been convicted of felony or misdemeanor when the opposite side may bring evidence to show that he has.

These kind of questions naturally only occur on cross-examination and the court may check any unnecessary latitude.

A witness may be examined as to what he stated on a former trial or out of court, or as to his own previous history.

A witness cannot be compelled to answer matter contained in privileged communications, such as may have passed between a client and his legal adviser, husband and wife, or confidential communications between government officers and their subordinates, &c.

"*Leading questions*," that is questions which suggest the answer, are not in general admissible in the examination-in-chief, or in the re-examination (except on what was said at cross-examination), but are admitted to the fullest extent "short of putting words into a witness' mouth" in the cross-examination; the principle being that the law presumes a witness to be biased in favour of the side which calls him, and hostile to the opposite side.

There are some exceptions to this rule. Leading questions are admitted in introductory questions, with a view to save time and to come more speedily to the points at issue, as: "Were you in such and such a street at such a time?"

If a witness has described a person, the person may be pointed out and he may be asked:—"Is that so and so?"

Where a witness has sworn to a certain fact, and another is called to contradict that fact, he may be asked directly:—"Did such and such a fact take place?"

When a witness is obviously hostile to one party, and is contumacious and will not answer direct questions, the Counsel usually asks the permission of the court to put leading questions to him, which the court may allow.

Leading questions are sometimes allowed to be put to

youthful witnesses or to unintelligent savages whose attention cannot otherwise be called. In all cases the court has to judge of the fairness of the question.

A witness once cross-examined may have leading questions put to him on re-examination, when he may be asked all questions which may be proper to draw forth an explanation of what was said in the cross-examination and on the motive which induced the witness thus to speak.

CHAPTER VIII.

PROCEDURE AT TRIAL,

CONFIRMATION AND REVISION, PROMULGATION, EXECUTION OF SENTENCE, PROCEDURE IN CIVIL OFFENCES.

All essential features relating to the conduct of the proceedings of a C. M. are laid down in the Act, and these are supplemented by "Rules of Procedure" which afford a guide for almost every contingency that may occur. The non-observance of the first invalidates the trial; the same in the case of the latter would not necessarily do so unless the ordinary principles of justice are departed from.

R P. 55. By R. P. 55, the proceedings of a C. M. are not necessarily invalid by reason solely of any deviation from the R. P., or on account of any technical defects, unless injustice has been done to the prisoner thereby; although an officer is not relieved from responsibility for disregarding any of these rules.

R. P.132. Also any deviation from the forms given in the appendices to the R. P. as to the forms of charges, warrants, proceedings, etc., will not render them invalid; nor will an omission of any such form render any act or thing invalid.

The provisions contained in the Act and R. P. are further supplemented as to details in the Queen's Regulations and General Orders. The non-observance of these do not invalidate the trial although of course officers are

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held individually responsible to obey all existing orders and regulations.

Irregularities and departure from regulations are often animadverted on by the confirming authority, not in the proceedings themselves but in a separate minute to the members.

THE PROCEEDINGS.

The whole of the proceedings are to be accurately recorded in a clear legible hand, without erasures. Printed "Army Forms" are supplied for the purpose which have to be filled up.

To ensure the legality of all proceedings the second Appendix in the R. P. contains the "Form of Proceedings of a G. C. M., including some of the more unusual incidents which may occur to vary the ordinary course of procedure, with instructions for the guidance of the court," and these have to be accurately followed. The same form is used for D. C. M. and Field G. C. M. as for G. C. M., with the substitution of the words District or Field General for General, and with the omission of all reference to the J. A. where there is none.

A similar form is used for R. C. M.

Erasures and interlineations are forbidden, but when a few are unavoidably made they are to be verified by the President's initials. The pages are numbered and the sheets fastened together; a convenient margin is always left and in it references are inserted to the subject matter, as "first witness for the prosecution," "defence," etc. The finding is noted in the margin, and the sentence briefly. Also the questions and answers are numbered in the margin. Sufficient space, at least half a page, must be left immediately below the President's signature for the remarks and signature of the confirming officer.

The proceedings are always signed by the President who also adds the station and date. When there is a J. A. he counter-signs them, and he also signs all separate documents belonging to the proceedings in addition to the signature of the President.

It is usual for the J. A. to obtain the signature of the President to the finding and sentence of the proceedings as prepared in court and before the rising of the court, and he then afterwards prepares a fair copy. The two copies are then compared and the fresh copy signed by both; the fair copy is then sent for confirmation. At foreign stations it is usual for the General to require the J. A. to furnish him with a copy of the proceedings for record in his office; usually the rough copy prepared in court does for this.

R.P. 93. The J. A., or if there is none, the President, is responsible for a proper and accurate record of the proceedings.

The evidence is taken down in a narrative form in as nearly as possible the words used, but where the prosecutor, prisoner, J. A., or the court, consider it material, a question and answer is taken down verbatim.

Any question or tender of evidence which has been objected to shall, if the prosecutor or prisoner so requests or the court think fit, be entered with the grounds of the objection and the decision of the court.

In case of addresses or the summing up of the J. A., if not in writing, only so much as the court and those making the addresses think proper need be recorded.

But care must be taken that sufficient record of the prisoner's defence is made as will enable the confirming officer to form an opinion on the defence.

The court must not enter in the proceedings any comment or anything before the court which does not form part of the trial, though the court may forward any such matter in a separate document signed by the President.

R.P. 94. The J. A., or if there is none, the President, is charged with the custody of the proceedings; but they may, with proper precautions for their safety, be inspected by the members of the court, the prosecutor, and prisoner at all reasonable times before the court is closed to consider the finding.

ASSEMBLY OF COURT.

On the court assembling according to order the President, who must in all cases be the senior *combatant* officer, takes his seat at the head of the table, and the President (or J. A.) calls over the rank, names and corps of the members, who take their seats according to rank alternately to the right and left, and may not leave them without permission of the President. R. P. 22.

The members take their seats according to their army rank, except at R. C. M. consisting entirely of officers of the same corps when they take their seats according to their regimental rank. R. P. 57.

The names of the President and members, and J. A. if any, are entered in the proceedings.

The hour at which the court opens is always recorded, and the hour of every adjournment and the hour at which it stands adjourned (unless until further orders) must be precisely noted in the minutes, also the time at which the court re-assembles, and alterations (if any) in its composition.

The charge sheet and summary of evidence are laid before the court. (No summary is prepared for a R. C. M.)

All documents relating to the court or to the matters before it which are intended to form part of the proceedings (such as an order respecting the time of sitting, or directing an adjournment, etc.) at whatever period of the trial they are received should be read in open court, marked so as to identify them, signed by the President, and attached to the proceedings.

CONSTITUTION OF COURT.

When the President and members are duly seated their first duty is to satisfy themselves that the court is legally constituted, viz :— R. P. 22.

1. That it has been properly convened and the President and J. A. appointed, by the reading of the orders (see below).

R.P. 18-21. 2. That the officers are all eligible to sit, (see Chapter V, page 53) and that the number detailed are present, A. A. 48. (save as in R. P. 18 p. 56) and are not less than the legal minimun.

A.A.47(4) 48(6) 183(1) 184 (1) 3. That the President is duly appointed, and is of the required rank.

4. In the case of a G. C. M. that the officers are of the required rank (R. P. 21, p. 54).

5. That the J. A. (if any) is duly appointed and not disqualified (R. P. 99, Chap. VII, p. 95).

R.P. 22. A.A.47 (5) 48 (c) 183(1) 184(1) 6. That the charge is against a person amenable to military law and to the jurisdiction of the court.

7. That each charge discloses an offence under the Act, is properly framed, and is so explicit as to enable the prisoner readily to understand what he has to answer (R. P. 10, 11. Chap. VI. p. 69-72).

The court, if not satisfied on any of the above matters, adjourn and report their opinion to the convening officer.

R.P. 24. The prosecutor now takes his place, and the court cause the prisoner to be brought before it. The presence of the prisoner is entered, as all proceedings in open court must take place before him. The name of any Counsel for the prosecutor or prisoner, or "friend" to assist the latter, is also entered.

As there is only one legal manner in which any C. M. can assemble the order convening the court and the date of the order and also the order appointing the President and J. A. are read over in the prisoner's hearing, signed by the President and attached to the proceedings.

CHALLENGE AND SWEARING.

R.P. 25. The court must then ascertain that the prisoner has no *reasonable* objection to any officers of the court; for this A.A. 51. purpose the rank and names of the president and members are read over in his hearing, they severally answer to their names so that the prisoner may identify them,

and the following question is put by the President to the prisoner:—

"Do you object to be tried by me as the President, or by any of the officers whose names you have heard read over?"

A prisoner cannot "challenge" (object to) the court generally, nor the whole of the officers collectively, nor the J. A. or prosecutor; but he has the privilege of objecting to all or to any one of the officers composing the court individually for any reasonable cause, and each objection is entertained separately by the other officers forming the court, and it is entirely the province of the court to decide as to the validity of any objection. A. A. 51 (1) A. A. 51 (2)

The prisoner must state the names of all the officers to whom he objects before any objection is disposed of, and he may call any person to give evidence in support of his objection.

The officer whose challenge is being entertained generally leaves the room and his challenge is decided by the votes of all the rest.

If more than one officer is objected to, the objection to the lowest in rank is disposed of first and all the other officers vote on the disposal of such objection notwithstanding they are themselves challenged.

Any objection made by the prisoner is recorded in the proceedings, as also any evidence in support of the objection.

When an objection is allowed, that officer at once retires from the court and, if he is not the president, one of the officers in waiting at once takes his place, or if there are none the court should ordinarily adjourn (see R. P. 18. Chap. V. p. 56).

The prisoner is given the opportunity of challenging any fresh officer who may supply the place of one retiring, his name is read to the prisoner and a like question is put to him. The fact that this opportunity has been afforded him must appear on the proceedings.

In the case of challenges, the court has to decide on the *assertion* of the prisoner challenging, of the officer challenged, and of the witnesses adduced, since it cannot receive evidence on oath before being itself sworn in; the court is as usual cleared for deliberation.

Peremptory challenges, that is challenges without reasonable cause assigned, are not allowed by C. M., but for every challenge a cause must be shown.

This differs from the civil practice where, in trial for felony before criminal courts, the prisoner has a right of peremptory challenge of twenty jurors without showing cause, and then he may challenge others with showing cause.

The following are some valid causes of challenge against officers in addition to those who are disqualified by R. P. 19. (p. p. 53, 55):—

1. Having been heard to declare an opinion unfavourable to the prisoner maliciously, or having expressed an opinion respecting the prisoner in connection with the charge in question.

2. Age or infirmity.

It has been seen that interested parties are disqualified. But a difficulty arises in answering the question as to what constitutes an interest? The proceedings of a court for the trial of a private for stealing a case of wine from the officer's mess was quashed by the J. A. G. in London, although the prisoner himself raised no objection, on the ground that some members of the court belonged to the prisoner's regiment, and were therefore interested parties. So again, a drum case, which was stolen by a private, was considered to belong to the regiment, and the proceedings were quashed for the same reason. But since the above cases occurred it has been ruled that however undesirable it may be in such cases to appoint officers of the corps to serve on the court, it is not necessarily illegal.

It is no ground for challenge that the court has already tried another prisoner for an offence arising out of the same circumstances.

It has been seen that an objection to the President is only valid if allowed by not less than one-third of the members; if allowed, the court adjourns for the appointment of another President. The objection to any other officer is decided by a majority of votes. In this case the

President has no casting vote, if the votes are equally divided the objection is allowed.

The prisoner may also object to the constitution of the court for defect in rank, below the legal minimum, or otherwise. Such a matter should, of course, be discovered by the court itself; if not, it would be better for the prisoner not to challenge but to allow the trial to proceed and get the proceedings quashed afterwards on the ground of illegality.

As soon as all challenges have been disposed of, and the court is properly constituted, the J. A., where there is one, administers the oaths first to the President by himself as a mark of respect and then to the other members collectively. When there is no J. A. the President administers the oath to the other members collectively, and then any sworn member administers the oath to the President. R. P. 20.

A court may be sworn at the same time to try any number of prisoners then present before it, whether the prisoners are to be tried together or separately, and each prisoner is asked separately whether he objects to any member. R. P. 70.

In the case of several prisoners to be tried separately, if one prisoner objects to any member, the court may either proceed to determine that objection or postpone his case and swear the members for the trial of the others taking them in succession.

Any number of prisoners may be tried together on the same charge for an offence committed collectively, but the plea, finding, and sentence must be recorded separately for each. Practically, however, this is not found sufficient as it is usual for the General in command to require the court to give a complete separate record for each prisoner. The advantage of trying them collectively in that case is that as many writers as there are prisoners can be at work at once. R. P. 15.

The President and members who take the same oath are sworn to try the prisoner (or prisoners, R. P. 29) ac- A.A. 52(1)

cording to the evidence, to administer justice according to the Army Act, not to divulge the sentence of the court until it is confirmed, nor to disclose or discover the vote or opinion of any particular member of the C. M. *at any time* unless required to do so in due course of law.

A.A.52(2) R. P. 27. An oath of secrecy is then administered to the J. A. and to officers under instruction so that they may be present during the deliberations of the court with closed doors.

The prisoner is then asked whether he objects to the person (if any) chosen to act as interpreter, or short-hand writer, any objection being considered and disposed of as for a member of the court.

R. P. 27. The interpreter and short-hand writer, if any, are then sworn to take down the evidence, or interpret, etc., to the best of their ability.

R. P. 80 A.A.52 (3) Witnesses need not be present when the oaths are being administered, but each witness is himself sworn before giving his evidence.

A.A.52 (4) R.P.28,80. Where a person whether member, witness, or other, is required to take an oath, objects to take an oath, or is objected to as incompetent to take an oath, the court, if satisfied of the sincerity of the objection or of an oath having no binding effect on the conscience of such person, allows a solemn declaration in the prescribed form to be made instead.

R. P. 30. Or an oath may be administered in such form and with such ceremonies as the person to be sworn declares to be, according to his religion, binding on his conscience, and the words "You do swear" and "So help me God" may be omitted or varied for the purpose (see chapter XV. on Evidence).

A.A.29,126 (2) A solemn declaration is as binding on a person to speak the truth as an oath, and he is equally liable to punishment for perjury.

In former years members of C. M. held under the Royal Prerogative were not sworn at all, though when held under the Statute they were. In 1808 the practice of swearing members and witnesses of R. C. M. was introduced, but the Duke of

Wellington strongly objected to the introduction of this practice on the ground that it changed the character of the courts from "courts of honour and discipline" to "courts of law" and introduced a great deal of perjury as lying witnesses could not then be disbelieved by the court, and because their decisions would now have to depend on the evidence of those (*i. e.* soldiers) whose actions it was required to restrain.

Sir Charles Napier strongly supported this opinion and stated that it was highly objectionable that officers should be made attorneys at law, and urged that C. M. should be courts of honour.

Legislation of late years has tended more and more to turn C. M. into courts of law, and they have lost their character of courts of equity. With the admission of civilian lawyers at C. M. officers are liable to be placed in a very unenviable position.

The prosecutor is the only officer of the court whose duties are founded on the supposition of a C. M. being a court of equity, for he is by regulation prohibited from establishing the charge and obtaining a conviction by all legal means in his power as he has to behave impartially and not suppress any evidence which might tell in favour of the prisoner.

PROSECUTION, DEFENCE, AND SUMMING UP.

After all the oaths have been administered the prisoner is arraigned on the charges against him. These are read to him in open court, when the witnesses, if present, are ordered out of court, and he is then required to plead separately to each charge. R.P. 31.

If the prisoner has claimed to be tried by C. M. in lieu of submitting to the summary award of his C. O. the prosecutor informs the court of this fact.

After reading *each* charge the President asks: "Are you guilty or not guilty of the (first) charge against you, which you have heard read?"

When two or more prisoners are tried together, each is separately arraigned in like form.

Where the convening officer directs any charges against a prisoner to be inserted in different charge-sheets, the prisoner is arraigned and, until after the finding, tried upon each charge sheet separately one after the other in the order appointed. R.P 61.

After the finding the court proceed as if all the charges had been contained on one charge sheet.

The convening officer may direct that if the prisoner is convicted upon a charge in one charge-sheet he need not be tried upon the subsequent charge-sheets.

When a charge-sheet contains more than one charge the prisoner may, before pleading, claim to be tried separately on each charge on the ground that he will be embarrassed in his defence if he is not tried separately, and unless the court think the claim unreasonable they may proceed as if the convening officer had inserted one or more charges on different charge-sheets.

R. P. 39. When required to plead to any charge the prisoner may object to the charge on the ground that it does not disclose an offence under the Act, or is not in accordance with the R. P. The court is closed to consider the objection; if allowed they adjourn and report to the convening officer, if disallowed the trial is proceeded with.

R. P. 34. Or, before pleading to a charge, he may offer a special plea to the general jurisdiction of the court (*i.e.* plead in bar of trial). If the court consider that anything stated in such plea shows that the court have not jurisdiction they receive any evidence in support taken on oath, any evidence of the prosecutor in disproof, and any address by the prisoner and reply by the prosecutor. If the court overrule the special plea the trial is proceeded with; if allowed, they record their decision and reasons for it, adjourn, and report to the convening officer. Such decision does not require confirmation, and the convening officer either convenes another court for the trial of the prisoner or orders him to be released.

If the court are in doubt as to the validity of the plea they may adjourn and refer the matter to the convening officer, or they record a special decision and proceed with the trial.

A prisoner pleading to the jurisdiction may aver that he is no soldier, or not amenable to military law, or that the court is not legally constituted, or that the offence

was committed more than three years before the trial, &c.; or he may allege a previous punishment for the offence by the C. O., (deprivation of acting rank is a valid plea), or a former acquittal or conviction, or a pardon, or that the offence has been condoned by his having been intentionally released from confinement and placed on duty, or want of specification in the charge.

A prisoner may also plead that the charge does not disclose an offence under the Act, and that it is not in accordance with the R. P.

At any time during the trial a mistake as to the description of the prisoner can be amended by the court. Also the charge, if necessary, can be amended by the convening officer, but the court must adjourn for the purpose *before* the examination of witnesses has commenced. R.P. 33.

If no special plea to the general jurisdiction of the court is offered, or if such plea, being offered, is overruled, the prisoner's plea—"Guilty" or "Not Guilty" is recorded on each charge. R.P. 35.

If he refuses to plead, or does not plead intelligibly, or stands mute, a plea of "Not Guilty" is recorded.

A plea of "Guilty" is in law a conclusive admission by the prisoner of his guilt, and further evidence is not required for the purpose of proving the charge, and in a C. M. the plea of guilty is equally conclusive ; but before recording a plea of 'guilty' the court has to ascertain that the prisoner understands the nature of the charge, and has to inform him of the general effect of that plea, and in particular of the difference in the procedure which will be made by that plea.

If there are any other charges in the same charge-sheet to which the prisoner pleads "not guilty", these charges are taken first by the court and the trial proceeded with on them until after the 'Finding,' and then those to which he pleads 'guilty' are taken. But if the other charges are alternative charges, the court may proceed as if he had pleaded "not guilty" to *all* the charges. R.P. 36.

When the other charges are so far disposed of, the charge to which the prisoner pleaded "guilty" is then read to him again and he is asked: "Do you wish to make any statement in reference to this charge to which you have pleaded guilty?"

The substance of the prisoner's statement is taken down in the first person and as nearly as possible in his own words. If the court are satisfied from the statement that he did not understand the effect of the plea of "guilty," they enter a plea of "not guilty" and proceed with the charge.

If the plea of "guilty" is not altered, the court proceed to record the "finding" *at once*. The summary of evidence is *then* read, signed, and attached to the proceedings.

After the summary of evidence is read the prisoner may call witnesses as to his character and may then make a statement in mitigation of punishment, but no other address is allowed.

If there is no summary of evidence, as in the case of a R. C. M., sufficient evidence is taken, in the same manner as for a plea of not guilty, to enable the court to determine the sentence and the confirming officer to know all the circumstances connected with the offence. The prisoner may then call witnesses as to his character and then make a statement in mitigation of punishment, but no other address is allowed. Whenever the court consider that anything the prisoner states in mitigation of punishment requires to be proved, they will permit the prisoner to call witnesses.

R.P. 37. At any time during the trial the prisoner may, if he thinks fit, withdraw his plea of "not guilty" and plead "guilty," when the court will record the plea and proceed as above.

R.P. 38. After the plea of "not guilty" to any charge is recorded the prosecution is commenced.

PROSECUTION.

The prosecutor may *always*, if he desires, make an

opening address. The evidence for the prosecution is then taken.

If the prosecutor has to give evidence for the prosecution he should give it after his address, being first sworn. He may be cross-examined by the prisoner, after which he may make any statement which might be made by a witness on re-examination. The prosecutor then proceeds to call witnesses.

Every witness called is liable to be examined as follows:

(1.) Examined by the party who calls him.

(2.) Cross-examined by the opposite party.

(3.) Re-examined by the party who called him.

(4.) Examined by the court.

In every case where the prisoner does not cross-examine a witness for the prosecution the statement that he declines to do so is recorded in order that it may appear on the face of the proceedings that he had the opportunity given him of cross-examination. In joint trials it must be recorded that each prisoner so declines, or otherwise.

The evidence is then read to the witness (R. P. 81, Chap. VII., p. 99.) R.P. 81.

The court if they think fit may, at the request of the prisoner, allow the cross-examination of a witness to be postponed.

During the taking of evidence any member may desire a question to be put to a witness or to the J. A., but such questions have to be put to the President as the court has to decide whether there is any objection to put any particular question and if objected to it is not put; if allowed it is put as "a question by the court," but such questions by the court to a witness should, as a rule, come after the re-examination.

If any question should arise incidentally during the trial the person, whether prosecutor or prisoner, requesting the opinion of the court is to speak first, the other person is then to answer, and the first person is allowed a reply. R P. 69

A .er the evidence of each witness is completed, the

words "the witness withdraws" are entered on the proceedings and a line is ruled right across the page.

R.P. 60 Where two or more prisoners are tried together the evidence and address on the part of all the prisoners are taken before the prosecutor replies, who is limited to only *one* address as regards all the prisoners.

In ordinary cases addresses by the prosecutor are unusual, but in all important or difficult cases he would generally open his case by a statement of the facts he proposes to prove and the nature of the evidence by which he intends to establish the different points of the case. He must be careful not to introduce into his address any matter foreign to the charges, nor may he insinuate imputations not implied by them.

Where he is permitted to make a second address, he may do so for the purpose of summing up the evidence for the prosecution and in order to explain to the court the bearing and effect it has produced and any points he desires to make clear, but he may not state anything in the way of new facts relating to the case or which partake of the nature of giving evidence.

The finding of a G. C. M. was once set aside because the prosecutor, in his reply, stated new facts relating to the case, thus giving fresh evidence adduced at the wrong time after the prosecution had closed and given by a person not on oath and not open to cross-examination.

DEFENCE.

R.P. 39. At the close of the evidence for the prosecution the prisoner is placed on his defence.

He is asked if he intends to call any witnesses other than witnesses as to character. The object of this question is simply to determine whether the prosecutor's second address is to be given before or after the defence.

The prisoner may make his defence on various grounds, and the defence may therefore take different forms. For instance, he may endeavour to:

(*a*) Disprove the *facts* of the charge, or

(*b*) Disprove the *particulars* alleged, thereby showing absence of criminal intent, or

(*c*) Show the evidence for the prosecution to be unworthy of belief, or

(*d*) Prove insanity at the time of the commission of the act, or that it was done under compulsion, or

(*e*) He may bring up pleas to the general jurisdiction of the court, or

(*f*) The defence may be only in mitigation, or

(*g*) He may urge misfortune or chance.

Ignorance of the law is no defence, nor is it a mitigation of the offence if committed under the influence of drink, drunkenness on the contrary is as a rule an aggravation of the offence.

Misfortune or chance, where there has been no culpable negligence, is a defence, but if the act was unlawful then chance only serves as a plea in mitigation.

Where the prisoner calls no witnesses other than as to character:—

(*a*) The prosecutor may address the court a second time, to sum up the evidence for the prosecution.

(*b*) The prisoner will then be asked if he has anything to say in his defence, and may address the court in his defence.

(*c*) The prisoner may call witnesses as to his character.

(*d*) The prosecutor may produce, in reply to the witnesses as to character, proof of former convictions and entries in the defaulter book, but he may not again address the court for as there is no evidence for the defence there need be no reply.

If the prisoner states that he *intends* to call witnesses other than as to character:— R.P. 40.

(*a*) The prisoner is first asked and may open his defence with an address as above in (*b*).

(*b*) He may then call witnesses, including witnesses as to character.

(*c*) After the evidence of the witnesses for the defence the prisoner may address the court a second time.

(*d*) The prosecutor is now entitled to address the court in reply.

The witnesses for the defence are examined in turn on oath in the same manner as the witnesses for the prosecution. A prisoner may defer cross-examining the prosecutor's witnesses until he is put on his defence, but the prosecutor cannot postpone the cross-examination of the prisoner's witnesses.

The addresses of the prisoner should be confined to the matter before the court; his opening address to the points on which his defence is grounded, the second to a brief summary of the importance of the evidence adduced.

It is clear that making violent attacks on the prosecutor, or assigning to him, or any other person, improper motives would be no defence. The value of any opening address depends on its being corroborated by evidence on oath, otherwise, treated as a mere statement, it is of no value and the prisoner, if he has no legal adviser, should be informed of this.

Great latitude must be given to the defence; but the prisoner is not to be allowed to make statements disrespectful to the court, or to use coarse or insulting language, or to animadvert at all upon persons who have not been before the court.

It must be remembered that the defence being an unsworn statement, unproved documents must be received for what they are worth, and any document tendered to disprove part of the prosecution must be duly proved before it can be considered as evidence.

The court may caution the prisoner that the line of defence he is pursuing is not likely to operate in his favour, but the court cannot refuse to hear him state arguments, etc., which, notwithstanding such caution, he may persist in putting forward.

Thus it is seen that where there is no evidence for the defence except as to character, there is no reply required, and

the prosecutor's final address is given at the end of the prosecution. If there are witnesses for the defence, the prosecutor replies after the defence is closed. In some cases he may be allowed to call witnesses then, but only about new matter which may have been introduced by the prisoner in his defence or to re-establish the credit of his witnesses, but no additional proof of the original matter may be brought forward. He may however impeach the credibility of the prisoner's witnesses, and in this last case only can the prisoner call witnesses to contradict those called for the reply, as he may re-establish the credit of the witnesses so impeached by evidence.

The J. A., if any, will, unless he and the court think a summing up unnecessary, sum up the whole case in open court. R.P.41.

The addresses and the summing up are usually prepared in writing, when they are handed in to the court, read, and attached to the proceedings.

After the J. A. has spoken no other address is allowed, and the court is then cleared to deliberate on the finding.

Where any address is not in writing the court record so much as they deem material as far as possible in the person's own words, but they must always record at least so much as the person, whether prosecutor or prisoner, making the address requires to be recorded.

The court generally adjourns to give the J. A. time to prepare his summing up. The summing up must be impartial and should lay down the law on any legal questions which may have arisen. He states clearly the several issues on which the court have to find and points out the evidence for and against each, but he must carefully abstain from giving any opinion as to whether such issue be proved or not by such evidence. He points out any variances and discrepancies in the evidence on either side, but draws no conclusions as to the effect of such evidence, nor as to which party he considers most worthy of belief.

Where a prisoner is defended by Counsel or by an officer

having the rights of Counsel, the addresses would be made by them.

At the conclusion of the second address the prisoner is asked whether he wishes to make a statement *himself* in addition. If he makes a statement the prosecutor may call witnesses in reply.

It often happens that the court has to adjourn at the close of the prosecution to enable the prisoner to prepare his defence, and also at other times to enable him or the prosecutor to prepare an address, and again at the close of the defence to enable the J. A. to prepare his summing up.

FINDING.

R.P.42. The finding is the opinion of the court relative to the prisoner's guilt or innocence with respect to each, or all, of the charges preferred against him. The court deliberate on their finding in closed court.

The opinion of each member is taken separately on each charge, and every member is required to state his opinion. When there is more than one prisoner the votes are taken separately for each.

The finding need not be unanimous (as in a Jury) but is solely the opinion of the majority.

The finding, if it be "guilty," is taken and recorded secretely. This is opposed to the rule of civil law which invariably requires the verdict to be given in open court. The reason for this important difference in the proceedings of C. M. is that no finding of a C. M. is valid until confirmed by proper authority, a finding of guilty on any or all of the charges being liable (like the sentence) to subsequent "revision" or it may be "not confirmed."

The J. A. remains in court, but can take no part in the proceedings unless consulted on legal points.

It is still in the power of the court to re-call a witness to put to him any particular question, not to re-open the evidence but to gain some particular information. The court must necessarily be re-opened and either party may cross-examine such witnesses on the points touched upon.

As a rule the finding on every charge is recorded simply as "guilty" or "not guilty," or "not guilty and honourably acquit him of the same." But when the facts which have been proved in the evidence differ materially from the facts alleged in the statement of particulars in the charge but are nevertheless sufficient to prove the offence stated in the charge, and the difference is not so material as to have prejudiced the prisoner in his defence, the court may record a "special finding"; that is the court find the prisoner guilty of the charge subject to the exceptions or variations annexed to the finding. R.P. 48.

The term "special finding" is applied to any finding except "guilty" or "not guilty," or "not guilty and honourably acquit him of the same." If the essence of the charge be proved but only part of the charge, then the court should find "guilty of the charge with the exception of....."

It may be stated specially which of the facts charged the court finds to be proved, or it may amend slight errors in the charge not material to the merits of the case. For instance, a prisoner charged with having committed an offence on a certain date and place, may be convicted of having committed the offence, but on some other date, or at some other place. Thus: "Guilty, with the exception that the offence was committed at —— instead of at ——, and on the —— 18 —— instead of the —— as stated in the charge."

A prisoner charged with stealing a certain sum of money may be convicted of stealing another sum.

Further, a prisoner if charged with a greater offence or one involving a higher degree of punishment, may be convicted of a minor offence if included in the greater offence of the same kind; but a court can never convict of a graver offence than is stated in the charge, nor of an offence of a different character.

Thus, a soldier charged with desertion may be convicted of an attempt to desert (and *vice versâ*,) or of absence without leave; a man charged with committing an offence "on active service" may be found guilty, but not on ac-

tive service. So violence to a superior "in the execution of his office," may be found simply violence to superior officer. But it cannot convict of desertion if the charge was absence without leave nor if a soldier is charged with desertion can he be convicted of insubordination.

But if the part of the charge which is not proved constitute the essence of the offence the court must acquit altogether; for instance if a soldier be charged with having *wilfully* maimed himself, but the evidence only prove that he maimed himself but not wilfully, the court must acquit altogether as the word wilfully constitutes the essence of the offence.

A. A. 56. It is specially enacted that a prisoner charged with stealing may be found guilty of embezzlement or of fraudulently misapplying money or property, and *vice versâ*.

Where the court are of opinion that the facts proved do not form an offence under the Act, the court acquit the prisoner. If the court are in any doubt on this point they may adjourn and refer to the confirming authority for an opinion.

A prisoner arraigned on "alternative charges," such as, —having stolen, or being found in possession of articles knowing them to have been stolen,—can be found guilty of only one charge. But, as above, if the facts proved do not appear to the court to constitute the offence mentioned in any of the alternative charges but think that the facts proved constitute *one* of the offences stated in two or more of the alternative charges, they may record a special finding or adjourn for the opinion of the confirming authority.

If the finding on each of the charges is "Not Guilty"
R. P. 44. the President will date and sign the proceedings, which will also be signed by the J. A., the finding will be pronounced in open court and the prisoner released, as
R.P. 50. no confirmation is necessary in case of acquittal.

The proceedings are then transmitted in like manner as if they required confirmation.

Insanity.—If the prisoner is unfit to take his trial by reason of insanity, or if he was insane when he committed the offence, the court take medical or other evidence on oath (a mere medical certificate is not sufficient) and, if proved, find specially the fact of the prisoner's insanity. If the finding is confirmed, the prisoner is kept in custody waiting disposal; if not confirmed, he may be tried again. A.A.130. R. P. 56.

PROCEEDINGS ON CONVICTION.

If the finding on any charge is "guilty," then for the guidance of the court in determining their sentence, the court re-open to take evidence with reference to the prisoner's (1) character from the number of entries in the defaulter book, and (2) from the number of previous convictions by C. M. or Civil Court. R. P. 45.

Evidence is then taken on the following particulars:—(3) Length of time he has been in arrest or in confinement on any previous sentence, and (4) awaiting trial on the present charges, (5) his age, (6) date of attestation, (7) service allowed to reckon towards discharge or transfer to reserve, and (8) any deferred pay, (9) service towards pension.

(10) And if the court is a G. C. M. or D. C. M. any military decoration or military reward of which he may be in possession or to which he is entitled and which the court can sentence him to forfeit. A.A.44.(12)

(11) If the prisoner is a warrant officer not holding an honorary commission, the regimental rank he held before his transfer is then stated.

(12) In the case of an officer, his army and regimental rank and date of last commission.

(On the trial of a commissioned officer only evidence of former convictions (if any) is produced at this stage of the proceedings, questions as to character, etc., not being authorized.)

If any of the above information cannot be stated from the regimental books the paragraphs in the printed form are struck out.

Evidence on the above matters is given by a witness

verifying a statement, previously prepared, which contains a summary composed of true extracts of the entries in the regimental books respecting the prisoner.

After recording the above evidence the court asks this witness whether he can identify the prisoner as the person referred to in the summary.

Then he is asked whether he has himself compared the contents of the statement with the regimental books and also whether they are true extracts from those books and a fair and true summary of the entries in the defaulter book.

As seen in Chap. VII (p. 90), the prisoner's character is ascertained by the production of a summary of all his entries in the regimental defaulter book exclusive of convictions by C. M., and of those by Civil Court which are entered in the Court Martial book, (see Procedure in Civil Offences). These entries are arranged in two columns, one containing all entries within the last 12 months and the other all entries since enlistment.

The other particulars as to the time he has been in confinement, etc., which are also recorded in the above statement, are obtained from the regimental books.

If the charge is for drunkenness the entries for drunkenness are stated separately.

To this statement is appended a " Schedule " containing a certified copy of all convictions by C. M. and those by Civil Court which are entered in the Court Martial book.

The statements in this Summary and Schedule are read to the court, signed by the President, and attached to the proceedings.

Before such evidence is given the witness, who should be a commissioned officer if possible but not a member of the court, is sworn like any other witness. As a rule the prosecutor gives the above evidence.

Former convictions by C. M. are proved by a certified

copy of their entry in the Regimental C. M. book or Defaulter book, and convictions by Civil Court by a certified copy of the certificate obtained from such court, or by a certified copy of the entry of such a conviction in the above regimental books.

The prisoner may figure in these certificates under different names, having assumed *aliases* or false names. This is no matter so long as the court be satisfied of the identity of the prisoner with the person described therein. Only convictions since his *first* enlistment, including any time passed in a state of desertion, may be brought up against him. In case of a man enlisted twice convictions during his first period of service can be brought against him.

The prisoner may cross-examine any such witness and call witnesses to rebut the evidence, and if the prisoner requests the regimental books must be produced and compared with the above Summary. R.P. 45.

SENTENCE.

The court is now again closed to consider their sentence, which is done secretely, and the votes of all the members are taken in the same manner as for the finding. Although some of the members may have voted for an acquittal every member is required to give an opinion as to the punishment to be awarded. R.P. 68.

The court awards only one sentence for all the offences charged. R.P 47.

The court is restricted from sentencing to any other punishment than may be legally awarded for the particular offence of which the prisoner may have been found guilty.

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A C. M. in passing sentence has regard primarily to the nature and degree of the offence and the previous character of the prisoner as proved in evidence. The court further considers if any circumstances have been

disclosed by the evidence in extenuation or aggravation of the offence.

It is directed that in ordinary circumstances and for a first offence a sentence should be light, and that except for hardened offenders short sentences are likely to be as effective as long ones. Sentences must vary according to the requirements of discipline, but for the lesser class of offences usually tried by D. C. M., in the case of first conviction it is laid down that a sentence of imprisonment should rarely exceed three months.

Just discrimination is therefore to be used by the court in applying the quantum of punishment to the nature and degree of the offence so that the award may be final and carried into effect, as it is indisputable that crimes are more effectually prevented by the certainty than by the severity of punishment.

Q.R.VI.70. In the instance of offences against superiors the principle should be acted upon that an offence having relation to the office held by the superior is of greater gravity than an offence against the individual apart from the duties of his office; also the lower the rank of the superior officer, and consequently the less the distance by which he is separated from the position or rank of the offender, the less will be the gravity of the offence.

A.A. 16. The only case in which a particular punishment is peremptory under the Act is the case of an officer convicted of scandalous conduct, "unbecoming the character of an officer and a gentleman," in which case he "*shall*.....be cashiered," so that no deliberation is in this case necessary.

In all other cases the punishment specified in the Act is the *highest* punishment that *may* be given in aggravated cases; and subject to regulations and according to the nature and degree of the offence an offender may always be sentenced to any less punishment than that stated.

A.A. 51(3,5), 53(8) In all cases there must be an absolute majority of the whole court except on a sentence of death which requires the concurrence of at least two-thirds.

R.P. 68. It is not sufficient that a greater number of votes should be given for any one kind of punishment than for any other punishment, unless the greater number forms a majority of the whole. It is illegal to determine the amount of punishment by adding up the number of years, days, etc., each member votes for and then striking an average, for the opinion of the majority may often be

overruled thereby, and a sentence may be awarded which has not been voted for by any one member of the court.

It is often convenient if the court differ as to the punishment to be awarded first to decide as to its nature and then as to its extent, and in general the court should first decide as to the nature of the punishment to be awarded and then the amount.

Thus if on a G. C. M. of nine members there is a difference of opinion as to the nature of the punishment to be awarded, this is decided first. If four vote for P. S. and five for imprisonment, the imprisonment is carried, and the votes will have to be taken again to decide the amount of imprisonment. If now, three vote for two years, four for one year, and two for 168 days, there is a majority of six to three that it shall not be more than one year, and of seven to two that it shall not be less than one year. The question should then be put—"Shall it be for 365 days."

Sentences of imprisonment are always to be specified in days, and if the prisoner is undergoing imprisonment under a former sentence the new sentence must not exceed such a term as will make up a period of two years from the date of the former sentence. Any sentence of P. S. or imprisonment whether original or revised, and whether the prisoner is already undergoing a sentence or not, commences from the date inclusive of the signature of the proceedings by the President who always adds the date to his signature. A.A. 68.

When several prisoners, tried together for the same offence, have been convicted the sentence (in the same manner as the plea, defence, and finding) for each must be recorded separately.

In the case of an officer a sentence of cashiering should precede a sentence to P. S. or imprisonment, and in the case of a N. C. O. such a sentence should be preceded by a sentence of reduction to the ranks even though such a sentence necessarily involves reduction to the ranks.

When a J. A. is present he is responsible that the sen-

tence is properly worded, and that it is within the powers of the court to award.

A.A. 53 (9) If the court desire to make a recommendation to mercy such recommendation is entered in the proceedings, as also if the court recommend any restoration of service forfeited on account of desertion or fraudulent enlistment.

R.P. 46.

A.A. 79.

In all cases the reasons for any recommendation are to be given, and the number of votes by which it is adopted or rejected may also be given.

Should the court desire to remark on the conduct of any parties before them, or on the manner in which a particular witness has delivered his testimony, or make any comment, they should embody their views in a separate letter to be signed by the President and attached to the proceedings.

Upon the court awarding the sentence the President dates and signs the sentence, and the proceedings, when counter-signed by the J. A., are to be at once transmitted for confirmation.

CONFIRMATION AND REVISION.

TRANSMISSION OF PROCEEDINGS.

The proceedings of a G. C. M., if held in the U. K., are transmitted without delay by the J. A. to the J. A. G. for the decision of the Sovereign; and in the case of the Royal Marines to the Secretary of the Admiralty for the decision of the Admiralty. If held abroad, they are sent to the General in Command or other officer having the power of confirmation.

R.P. 95.

A.A. 54(1).

Q.R. VI.99.

The proceedings of a D. C. M. are forwarded by the President (or J. A. if any) to the person directed by the convening authority, otherwise to the confirming officer, *i.e.*, an officer authorized to convene a G. C. M., or some officer authorized by him,—usually to the General Commanding the district.

A.A. 54 (1).

The proceedings of a R. C. M. are forwarded by the President to the convening officer, usually the C. O. of the regiment.

CONFIRMATION.

Courts Martial were instituted to aid superior authority; they are guided by the directions of the Sovereign or her representatives, and confirmation by the superior is necessary as the Crown has not delegated the whole of its judicial power in the case of military tribunals. Consequently the finding and sentence of a C. M. are not valid unless confirmed by the proper authority, except in the case of the finding of acquittal, whether on all or some of the charges, which finding does not require confirmation nor is it subject to revision, and if it relates to the whole of the offences it is pronounced at once and in open court and the prisoner is discharged. A.A. 54 (6). A.A. 54 (3).

The object of interposing the confirming authority before the execution of any sentence awarded by C. M. is, undoubtedly, with a view to a thorough investigation of the whole circumstances and that justice may be mercifully administered. The officer entrusted with this duty is not restricted from making any inquiries necessary on questions raised on the trial, and he may act on them in confirming or remitting the sentence.

The duty of the confirming authority is one of the first importance as on him devolves the whole responsibility of giving effect to the proceedings. He may confirm the finding and sentence wholly or in part, or withhold his confirmation, or send the proceedings back for revision once, or he may refer the confirmation to superior authority. He is required to be totally independent of the court and may therefore not be a member of the court. A.A. 54 (5) A.A. 54 (4)

The confirming officer has authority in all cases to vary the sentence or to mitigate or remit the punishment awarded, or commute it for any less punishment. He may also suspend for such time as seems expedient the execution of the sentence. R.P. 53. A.A. 57 (1)

It is his province to so exercise his authority and to regulate the amount of punishment awarded by C. M., that no sentence is greater than the interests of discipline and the merits of the case require, and that the findings Q.R. VI.95.

and sentences are legal. If the sentence is informally expressed he may vary the form, and if the punishment
R.P. 55. awarded is in excess of that authorized by law the confirming authority may vary the sentence so as to make it legal and confirm the sentence as so varied.

A sentence of death may be commuted to P. S. or to imprisonment with or without H. L.; or a sentence of P. S. to imprisonment with or without H. L. (within the prescribed limits); cashiering may be commuted to loss of rank, etc., etc.

If a sentence of death on an officer or N. C. O. be commuted to P. S. or imprisonment, the commuted sentence must first provide that the officer be cashiered, and the N. C. O. reduced to the ranks.

Imprisonment with H. L. may be mitigated to simple imprisonment; cashiering to dismissal; severe reprimand to reprimand.

In case of a sentence of P. S. or imprisonment for a certain period, a portion of the period may be remitted.

Her Majesty alone can pardon any prisoner convicted by C. M. when the proceedings have been confirmed.

The confirming officer records any remarks he may see fit
Q.R. VI.96. to make on any matter connected with the trial, and may direct his observations to be promulgated with the proceedings or otherwise.

When however he finds it necessary to comment on the in-
Q.R. VI.97. adequacy of a sentence, his remarks are not to form part of the minute of confirmation or be attached to the proceedings but will be communicated in a separate minute to the members of the court; or, in exceptional cases, where in the interests of discipline a more public instruction is required, they will be made known by publication in orders.

Should he think the trial should have resulted in a convic-
R.P. 50. tion, when the prisoner has been acquitted, and he desires to remark on the proceedings he must embody them in a separate letter for the information of superior authority.

If he thinks the proceedings illegal, he will withhold his con-
Q.R. VI.98. firmation; but if he has already confirmed the finding and sentence he will direct the record of the conviction to be removed and the soldier to be relieved from all consequences of his trial. In case of any doubt he may refer the matter to superior authority.

If the proceedings can be legally sustained, but an irregularity has occurred, the conviction may stand, but he will consider what reduction of the sentence (if any) is due to the prisoner.

If the confirming authority withholds his confirmation the sentence is annulled, the prisoner returns to his duty, and he cannot be tried again for the same offence, though conviction remains if the finding was guilty and there is no remission of any penalty consequent on conviction such as forfeiture of service, good conduct pay, etc., unless the confirmation is withheld on account of illegality.

When the proceedings are "quashed," or set aside after confirmation on account of their illegality or for any other cause, which is an action taken after confirmation by superior authority, in the case of a G. C. M. or D. C. M. by the J. A. G., or in that of a R. C. M. by authority of the General, the prisoner is also relieved from all con sequences of his trial, and all record of it is erased as the proceedings are then null and void.

No member of a C. M. can confirm its finding and sentence. Where a member becomes confirming officer, he must refer the proceedings for confirmation to a superior officer competent to confirm the like description of C. M. In a colony, where there is no such superior authority, the Governor may be the confirming authority. A.A. 54 (4)

Unless approved by Her Majesty no sentence of death can be carried into effect in the U. K.

A sentence of death passed in a colony, unless for an offence committed on active service, must, in addition to the ordinary confirmation be approved by the Governor of the colony, and in India by the Governor-General or Governor of a Presidency. A.A 54 (7,8)

When a person subject to military law is convicted of manslaughter, rape, or any other civil offence by C. M., and is sentenced to P. S., such sentence, in addition to the usual confirmation, must be approved by the Governors above mentioned. A.A 54 (9)

REVISION.

If the confirming authority disapproves of either the finding or sentence, or both, he may order the court to re-assemble for the purpose of revision, the part to be revised and the necessity of revision being stated to the R.P.50.

A.A. 54 (2) court in a separate minute. Revision can only be ordered
R.P. 51. once. The court re-assemble in closed court and may not receive any additional evidence, nor may any portion of the original proceedings be altered. No sentence can be increased on revision nor is the confirming authority allowed to recommend such increase.

The same members who formed the court originally must re-assemble, unless any member is absent owing to illness, prisoner of war, etc.

The letter directing the re-assembly of the court and the reasons therefore are read, signed and attached to the proceedings. The order for re-assembling would be read in open court, but the remarks of the confirming authority in closed court.

The court may either revoke their former finding or sentence, or both, as required, or "respectfully adhere" to their finding or sentence, or both, as the case may be.

Where the finding is sent back for revision, and the court do not adhere to their former finding, they revoke *both* the finding and sentence, and record a new finding and pass sentence afresh, even though the new finding may have been altered only on some trifling ground and the new sentence may be word for word with the former one.

If the court alter the finding they cannot then state that they "respectfully adhere to their former sentence." If they did so, the whole sentence would become invalid; they could not be assembled again to correct their error, as a court can only be re-assembled for revision once; and the man could not be tried again, inasmuch as he has been *convicted*. He would thus escape all punishment, except that if the finding were confirmed, it would count as a legal conviction and be recorded against him, and would carry with it such forfeitures as the conviction may necessarily entail.

When the sentence alone is sent back for revision, the court *cannot* revise the finding.

After revision the President signs and dates the decis-

ion of the court, and the proceedings, being signed by the J. A., are at once transmitted for confirmation.

When a sentence passed by a C. M. has been confirmed, certain authorities have power to mitigate, remit, or commute the punishment awarded, namely: Her Majesty, or the C. in C., or any Officer Commanding a district or station where the prisoner may for the time be; or in India the C. in C. of the forces, or of a Presidency; or in a Colony the Officer Commanding the forces in that colony, or if elsewhere then within the limits of his command. A.A.57.(9)

If after confirmation, one of several charges is subsequently found to be invalid, the above authorities should take into consideration such invalidity and mitigate, remit or commute a just proportion of the sentence. R.P. 59.

PROMULGATION.

When the proceedings of a C. M. have been confirmed, an extract therefrom in the case of a G. C. M., and the original proceedings in case of a D. C. M., are sent to the C. O. of the prisoner's regiment who is required to have the charge, finding, sentence, and confirmation with any remarks of the confirming authority on the proceedings, also any recommendation to mercy, promulgated and communicated to the prisoner in such manner as the confirming authority may direct. R. P. 59. A.A. 58 (9)

Failing any special directions it is usual, in the case of a N. C. O. or soldier, to promulgate the C. M. to the regiment assembled on parade.

The prisoner who remains in confinement if found guilty, is marched under escort in front of the parade. On his name being read out his cap is removed and he takes a pace to his front, remaining bare-headed until the conclusion of the promulgation. He is then either released or taken back to the guard-room to await imprisonment as the case may be.

So much of the proceedings as are above mentioned are read out by an officer, preceded by the heading of the C. M. and name of prisoner.

The date of promulgation of all C. M. not submitted for confirmation by Her Majesty is recorded on the proceedings and reported to head quarters. Q.R.VI 100.

All proceedings of C. M. transmitted, whether before or after promulgation, are to be accompanied by a covering letter specifying the nature of the contents. Q.R.VI 101.

The result of the C. M. is notified in regimental orders, and entered in the Court Martial Return and Regimental C. M. book besides the defaulter books.

Q.R.VI.108. After promulgation the C. O. returns the proceedings of a D. C. M. to the Assistant Adjutant-General of the district or Staff Officer of the station, who informs the President and J. A. to that effect. The General Officer commanding then transmits them without delay, under cover, to the J. A. G.

The proceedings of G. C. M. confirmed abroad are likewise transmitted to the J. A. G. as soon as possible after promulgation.

The proceedings of a R. C. M. are sent to the regimental depôt there to be preserved for the time (three years) required by law.

EXECUTION OF SENTENCE.

DEATH.

The court is not responsible for the manner of carrying out any punishment it may award nor for the place where it is carried out.

The authority confirming a sentence of death fixes the time and place. The court specifies whether the sentence is to be carried out by shooting or hanging. A soldier would be shot for a military crime, and hanged for murder or other civil capital offences.

PENAL SERVITUDE.

On a sentence of P. S. being confirmed the military convict may be kept in civil or military custody until he can be removed to a convict prison.

A.A.59-61. Certain officers are specified in the Act as "committing" authorities, and the order of a committing authority is sufficient warrant for the convict's transfer to a P. S. prison.

Also before his arrival at such a prison certain officers are authorized to discharge a convict.

Q.R.VI.141. Military convicts sentenced in India, or the Colonies, or in a

foreign country, is always sent to the U. K. to undergo his punishment.

These rules are given in A. A. 59-61, and Q. R. VI. 140-144.

IMPRISONMENT.

A person sentenced to imprisonment may have to undergo his imprisonment either in military custody or in a public prison.

The order of a committing authority is sufficient warrant for the transfer of a military prisoner to a public prison.

Certain officers are specified in the Act as "committing" authorities, also as "removing" and "discharging" authorities. A. A. 63, 67.

A removing authority may at any time order a prisoner to be removed from a public prison into military custody. And a discharging authority may at any time order a prisoner to be discharged.

The rules relating to these matters are given in A. A Sec. 63, 67, and Q. R. VI. 145-204.

As a rule a prisoner sentenced to more than twelve months' imprisonment in India or the Colonies is to be sent to undergo his punishment in the U. K.

A soldier under a sentence of imprisonment may be removed to any place beyond the seas where his corps or part thereof may be serving, as it is considered that soldiers in prison for military crimes may be given a fresh opportunity of recovering their character by being at once removed to a foreign station. A. A. 67.

In the U. K. and in some colonial stations there are certain military prisons for the confinement of military prisoners only, sentenced to more than 42 days imprisonment. Soldiers under shorter sentences are as a rule confined in provost prisons. Q.R.VI.182.

In the U. K. the Secretary of State for War, and in India the Governor-General are empowered to set apart portions of the ordinary public prisons as military prisons in order to prevent military prisoners, imprisoned for breaches of military discipline, from being contaminated by the presence of prisoners convicted of offences of an immoral, dishonest, shameful, or criminal character. A. A. 135.

R. P. 129 also details certain authorized prisons in the colonies for the committal of military prisoners. (See A. A. 130-135.)

But owing to the accommodation in colonial prisons being sometimes limited thus prohibiting portions being set apart for military prisoners, in 1882 a circular letter was sent from the Colonial Office to the Governors of colonies requesting that the following instructions be inserted in the Prison Regulations of the several colonies.

"Soldiers convicted of breaches of discipline only shall, so far as may be practicable, having regard to the prison accommodation and the circumstances of the case, be kept separate and distinct from prisoners convicted of offences of an immoral, dishonest, shameful or criminal character."

Q.R.VI.146. A military prisoner who is not to rejoin the service at the termination of his imprisonment will, if convicted of an offence of an immoral, dishonest, shameful, or criminal character, be committed to a civil gaol, but if convicted for a breach of discipline only he is dealt with in the same manner as if he were going to rejoin the service.

The term of imprisonment under sentence of C. M. commences on the day the President signs the original proceedings, and the day on which the prisoner is released also counts as a day.

Q.R.VI.170. Soldiers released from provost or other prisons at any hour are confined to barracks and exempt from duty for the remainder of the day.

Q.R.VI.183. Provost prisons, both garrison and regimental, are established for the confinement of soldiers awarded imprisonment by the C. O. and for carrying into effect the sentences of C. M. not exceeding 42 days. These prisons are under the control and supervision of General Officers commanding, and are in immediate charge of Provost Sergeants.

PRESERVATION OF PROCEEDINGS.

R.P. 96. The proceedings of a G. C. M. or D. C. M., whether confirmed in the U. K. or abroad, are, after promulgation, sent to the J. A. G. (or Admiralty) by whom they are examined and preserved, in the case of a G. C. M. for seven years, in the case of a D. C. M. for three years.

Q.R.VI.102. The proceedings of a R. C. M. are preserved for three years at the regimental depôt.

A. A. 124. Any person tried by C. M. may at any time within the

above mentioned periods, dating from the day of confirmation, obtain a copy of the proceedings upon payment. R.P.97. A.A. 127.

If the proceedings of a C. M. are lost, a copy, if any, certified by the President or J. A. may be accepted in lieu of the original. If there is no such copy, and sufficient evidence of the charge, finding and sentence, and transactions of the court can be procured, that evidence may, with the assent of the prisoner, be accepted in lieu of the proceedings; but if the prisoner dissents and the proceedings have not yet been confirmed the prisoner may be tried again. R.P.98.

The proceedings of a C. M. were once lost after being confirmed but before they were promulgated. It was decided that in the absence of the best evidence the next best was sufficient, which was furnished by a memorandum which had been made by the confirming officer and the deposition of the President as to the sentence, and the sentence was carried out.

The proceedings of G. C. M. or D. C. M. are examined in the office of the J. A. G. A monthly return of all C. M. is made up in the regimental office at the first of every month, containing the names of all men who have been tried and giving all information about the prisoner, his trial, sentence, etc., by C. M. during the preceding month. This is sent to the General Officer commanding.

These returns are rigidly examined at headquarters, and any irregularity is sure to be detected. This serves as a useful check upon minor Courts Martial.

PROCEDURE IN CIVIL OFFENCES.

On a soldier being charged with a civil offence he is handed over to the civil power.

When considered necessary, authority to commence or defend legal proceedings may be obtained from the Secretary of State in the U. K. In Colonies a Law Officer of the Crown may be obtained where possible with the assent of the Governor, or where no such Law Officer is available the General commanding may select a legal adviser to act for the War Department.

In any case, an officer is to be detailed to watch the case and report what has taken place. If the soldier is convicted application is made to the clerk of the court for a A.A. 164.

certified copy of the conviction, for which he is entitled to a certain fee (3s.) recoverable in the pay list. When the sentence exceeds seven days' imprisonment it counts as a conviction by C. M. and a certified copy of the conviction is entered in the C. M. book. When the imprisonment is seven days and under, the conviction is treated as an ordinary entry in the regimental defaulter book. But when the sentence is a fine, and the offender has not undergone imprisonment in default of payment, the C. O. may apply to the General commanding who may order that a regimental entry shall not be made.

Q.R.XXII. 40.

Q.R.XXII. 39.

In cases of conviction of felony or disgraceful conduct, or on a sentence of P. S., it is usual to apply for the discharge of the offender on account of his being incorrigible and worthless. To such an application is attached copies of defaulter sheets and previous convictions, and the C. O. has to state that in his opinion the offence was not committed with a view to obtaining discharge.

Q.R.XIX 170, 176.

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CHAPTER IX.

FIELD GENERAL, AND SUMMARY COURTS MARTIAL.

PROVISIONS RELATING TO FIELD GENERAL COURTS MARTIAL.

A Field G. C. M. can only be convened "in any country beyond the seas;" but it may be convened by *any* officer (of any rank and without warrant) in command of any detachment or portion of troops, to try a person subject to military law under his command accused of an offence committed against the property or person of any inhabitant of the country. A.A 49.(1)

No other offences can be tried by this description of court.

A Field G. C. M. is however only to be assembled by such officer, although not authorised to convene a G. C. M., if in his opinion it is not practicable to try the offender by an ordinary G. C. M.

A Field G. C. M. must consist of not less than three officers who may be of any rank or service.

The convening officer may preside; but whenever practicable he should appoint another officer as president who may be of any rank, but if practicable not below the rank of captain.

A. A. 48 (p. 51–54, 60), dealing with general rules for G. C. M. and D. C. M., does not apply to a Field G. C. M. which has the same powers as a G. C. M., but if the court pass a sentence of death *all* the members must concur. A A.49.(2)

A.A.49.(3) In spite of the restrictions in the Act in respect of trial of civil offences by C. M., a Field G. C. M. may try *any* civil offence against the property or person of an inhabitant of the country, and such offence must be charged under Sec. 6 of the Act, notwithstanding that it is a civil offence within the meaning of Sec. 41, whether murder, robbery with violence, &c., (see Chap. X.)

This court is specially designed for the investigation of an alleged offence on the spot in such cases as the march of detachments to and from depôts, hospitals, etc., on the lines of communication of an army, and when soldiers might commit an outrage on an inhabitant and it would be inconvenient to convey the witness to headquarters.

A.A.54.(1) A Field G. C. M. may be confirmed by any officer having authority to confirm the findings and sentences of G. C. M. for the trial of offences in the force of which the detachment under the command of the convening officer forms part.

A.A.124. R.P.103. The proceedings when confirmed are sent to the J. A. G. and are kept for three years.

R.P.103. The course of procedure of a Field G. C. M. is to be the same as in the case of a G. C. M. subject to the following exceptions :—

(*a*) The copy of the charge, &c., is to be furnished as soon as practicable before the court assemble, whenever Rule 14 (p. 75) cannot be complied with.

(*b*) Rules 5 and 8 (p. 45, 46) as to preparation of summary of evidence by C. O., 20 (p. 54) rules as to corps of members, 21 (p. 54) and as to their rank, 102 (p. 78) and power for suspension of rules do not apply.

(*c*) Rules 95 (p. 130) as to forwarding the proceedings for confirmation, and 96 (p. 138) as to their preservation apply as if the court were a D. C. M.

(*d*) Rule 19 (p. 53) as to disqualification of officers on account of length of service, of convening officer, of C. O.
A.A.50.(3) or officer who investigated the charges, or member of a court of inquiry, do not apply ; but no officer who is the

prosecutor, or a witness for the prosecution, or who has a personal interest in the case may serve on the court.

(*e*) No J. A. is required.

(*f*) On a plea of 'Guilty' the court proceed as in the case of a R. C. M. (p. 116).

(*g*) Rules 13 (p. 74) opportunity for prisoner to prepare his defence, 38, 39, 40 (p. 116–120) concerning rules as to addresses, etc., during prosecution or defence, and 63 (p. 86) as to time for trial, shall only apply so far as it appears to the convening officer or to the court to be practicable having due regard to the exigencies of the service, provided that the prisoner has full opportunity of making his defence and is afforded every practicable facility for preparing it.

The usual oaths are administered to members and witnesses, etc.

R. P. Second Appendix No. 4 gives the form of order for the assembly of a Field G. C. M.

If the name of the person charged is unknown he may be described in the Schedule (which takes the place of a charge sheet) as unknown with such addition as will identify him, as "Person accompanying the force (name unknown), white jacket and trousers, scar on right cheek."

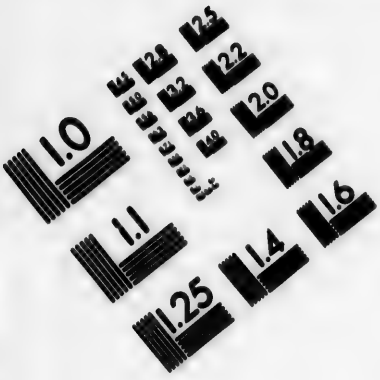
The form of proceedings for a G. C. M., given in R. P. Second Appendix applies equally to a Field G. C. M.

PROVISIONS RELATING TO SUMMARY COURTS MARTIAL.

None of the R. P. relating to ordinary C. M. apply to S. C. M., which are subject to the following rules:— R.P.104.

A S. C. M. may be convened by the C. O. of any corps or portion of a corps *on active service*, or by *any* officer in immediate command of a body of forces *on active service*, for the trial of a person subject to military law charged with an offence. A.A.55 (1)

Such officer is however only to assemble a S. C. M. if he considers it impracticable to convene an ordinary C. M., or if, being below the rank of F. O. and not a C. O., he does not think it practicable to delay the trial for reference to a superior officer.



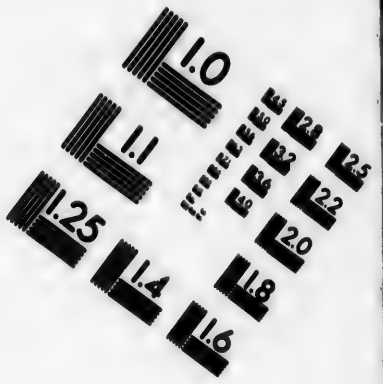
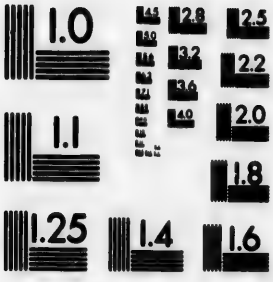
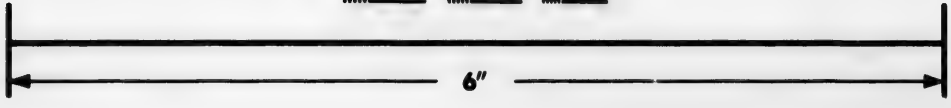


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R.P.105. A.A.55 (2) The court must consist of not less than *three* officers, unless the convening officer is of opinion that three are not available in which case it may consist of *two* officers; but where it consists of less than three the sentence may not exceed the summary punishment allowed, or imprisonment.

If three other officers are not available the convening officer may appoint himself President.

The President may be of any rank, but if possible not below the rank of captain.

The members should have held commissions for at least one year, and as many as possible should have three years service.

A provost marshal, or an assistant provost marshal, the prosecutor or a witness for the prosecution, may not serve on the court.

R.P.106. A form for the Assembly and Proceedings of a S. C. M. is given in R. P. Second Appendix (and the rules as to S. C. M. are also published separately in the form of a hand-book), but where circumstances prevent the use of such form, the C. M. may be convened and the proceedings carried out without any writing, except that such written record as is practicable is to be kept by a provost marshal or assistant provost marshal if present, or if not, by the President and the officer charged with the promulgation, and stating at least the name (or if name is unknown, the description) of the offender, the offence charged, the finding, sentence, and confirmation.

R.P.107. The statement of an offence may be made briefly in any language sufficient to disclose an offence under the Act.

R.P.108. The court may be sworn at the same time to try any number of prisoners then present before it, but, unless the offence was committed collectively, the trial of each prisoner is to be separate.

R.P.109. The names of the President and members are read over in the hearing of the prisoners, who are asked if any of them object to be tried by any of those officers.

If any prisoner objects, and any one member thinks the objection reasonable, the officer objected to must be replaced.

The regular oath is administered to the President and members. R.P.110.

The President then informs the prisoner of the charge explaining it fully to him, and he will then ask him whether he is guilty or not guilty. If a special plea to the general jurisdiction is offered by the prisoner, and is considered by the court to be proved, the court report to the convening officer. R.P.111. R.P.112.

The usual oath is administered to every witness, and the witnesses for the prosecution may be cross-examined by the prisoner who may call any available witnesses for his defence. R.P.113.

In the administration of an oath the usual alterations may be made, as in R. P. 30 (p. 112) or a solemn declaration may be made in lieu of an oath (R. P. 28.) R.P.114. A.A.52.(4)

The prisoner is allowed to make his defence and is asked what he has to say in his defence. R.P.115.

In the case of an equality of votes on the finding he is acquitted. Such a finding requires no confirmation, and if it is on all the offences charged it will be at once declared and the prisoner released. R.P. 116.

When the court consists of three or more officers it has the same powers as a G. C. M., but in case of a sentence of death the *whole* court must concur. R.P. 117.

When the court consists of only two officers the sentence may not exceed the summary punishment allowed, or two years' imprisonment. A.A. 55 (2)

Any recommendation to mercy is attached to the proceedings and communicated to the prisoner together with the finding and sentence.

Except in the case of challenge (R. P. 109) equality of votes on the finding (R. P. 116) and in case of a sentence of death (R. P. 117) every question is determined by a R.P. 118.

majority of votes. the president having a casting vote in case of equality.

If after the commencement of the trial the court consider any prisoner should be tried by an ordinary C. M. they may strike his name out of the Schedule.

This Schedule (see R. P. Second Appendix) consists of five columns. The first two are filled up by the convening officer or provost marshal.

These columns contain :—

1. Name or description of the offender.
2. Offence charged.
3. Plea.
4. Finding and, if convicted, sentence and any recommendation to mercy.
5. How dealt with by confirming officer, *i.e.*, confirmed or not confirmed, or confirmed and any remission of sentence, etc. ; the decision being signed by him.

At the bottom, the first two columns are signed by the Convening Officer the 3d and 4th by the President.

R.P. 118. The proceedings are held in open court in presence of the prisoner, except for deliberation when the court is closed.

The court may adjourn from time to time and if necessary view any place.

R.P. 119. The finding and sentence must be confirmed by proper authority before they are valid, except in the case of acquittal.

Neither the provost marshal nor an assistant provost marshal, nor the prosecutor, can confirm the finding and sentence.

A member of the court cannot confirm the finding and sentence unless he is an officer authorised by the R. P. to do so, and is of opinion that it is not practicable to delay the case for the purpose of referring it to another officer.

A.A. 53 (2). A sentence of death or P. S. must be confirmed by the

General or F. O. commanding the force with which the prisoner is present at the date of the sentence. But in case of death if such officer is not the C. in C. of the forces in the field, he should reserve the sentence for confirmation for a superior officer unless, owing to the nature of the country, the great distance, or the operations of the enemy, it is not practicable to delay the case.

Subject to the above exceptions the finding and sentence of a S. C. M. as regards *any* prisoner (officer or soldier) may be confirmed by any General or F. O., or by the C. O. of a corps or portion of a corps, or by any officer in immediate command of a detachment or portion of the body of the forces with which the prisoner is present. Provided that :—

(1) Any such officer in immediate command, if not otherwise qualified to confirm, should reserve the confirmation for superior authority unless it is not practicable to delay the case.

(2) An officer who has not power to confirm the finding and sentence of a G. C. M. or D. C. M. should reserve for confirmation by an officer having that power a sentence awarding pnnishment in excess of that which a R. C. M. can award; yet he may nevertheless confirm the sentence, if he mitigates, remits or commutes the punishment so as to make it a punishment and sentence for which he has power to confirm.

Any officer may reserve any finding and sentence for confirmation by superior authority.

An officer not having power to confirm the finding and sentence of a D. C. M. has not power to commute summary punishment into imprisonment for any period exceeding forty-two days.

A confirming authority can only send back a finding and sentence for revision once, when the court cannot take any further evidence nor increase the sentence.

The ordinary rules,—R. P. 53 (pp. 131, 135) mitigation of sentence on partial confirmation; R. P. 55 (p. 132) confirma- R. P. 120.

tion notwithstanding informality in or excess of punishment; R. P. 95 (p. 130), as to transmission of proceedings after finding; R. P. 96 (p. 138), as to their preservation; R. P. 97 (p. 139), rate of payment for copies of proceedings; and R. P. 98 (p. 139) loss of proceedings, shall, so far as practicable, apply as if a S. C. M. were a D. C. M.

CHAPTER X.

CRIMES AND PUNISHMENTS.

The principle of classification adopted in the Act classifying the different military offences is that of grouping together offences of a similar character and ranging the various groups as between themselves in a manner intended to impress the soldier with their relative importance. For example, the Act begins with the punishment of "offences in respect of military service" on the ground that misbehaviour in the field is the greatest crime that a soldier can commit. And these are divided into three classes differing in degree, viz.:—

1. Offences in relation to the enemy punishable with death.

2. Offences in relation to the enemy *not* punishable with death.

3. Offences punishable more severely on active service than at other times.

These are followed by "mutiny and insubordination" by way of shewing that after misbehaviour in the field mutiny and insubordination rank next in order amongst a soldier's crimes.

The particular punishments specified for each offence are *maximum* punishments, and the offender when *convicted by C. M.* of the offence is only liable to suffer such maximum punishment or "such less punishment as is in

this Act mentioned," except under Section 18 in the case of an officer convicted of scandalous conduct when it is laid down that he "shall be cashiered."

A maximum punishment is only intended to be imposed when the offence committed is the worst of its class, and is committed by an habitual offender, or is committed under circumstances which require an example to be made by reason of the unusual prevalence of that offence in the force to which the offender belongs.

The following is a summary of the different crimes enumerated in the Act:

OFFENCES IN RESPECT OF MILITARY SERVICE.

OFFENCES IN RELATION TO THE ENEMY PUNISHABLE WITH DEATH.

A. A. 4.

1. Shamefully abandons post, etc., or induces others to do so.

2. Shamefully casts away arms, etc., in presence of the enemy.

3. Treacherous correspondence with enemy, or sends flag of truce through treachery or cowardice.

4. Assists or harbours enemy.

5. When a prisoner of war voluntarily aids enemy.

6. On active service knowingly does an act calculated to imperil the success of the forces.

7. Misbehaves or induces others to misbehave before the enemy from cowardice.

Punishment—DEATH.

OFFENCES IN RELATION TO THE ENEMY NOT PUNISHABLE WITH DEATH.

A. A. 5.

1. Leaves ranks without orders to secure prisoners, or on pretence of taking wounded to the rear.

2. Wilfully damages property without orders.

3. Is taken prisoner by carelessness, or disobedience, or does not rejoin when able.

4. Holds correspondence with, gives intelligence to, or sends flag of truce to the enemy without authority.

5. Spreads reports calculated to create unnecessary alarm.

6. In action, or previously, uses words calculated to create

alarm or despondency.

Punishment—PENAL SERVITUDE.

Note difference between Sec. 4 (3), "treacherous correspondence," and Sec. 5 (4), "unauthorized correspondence."

OFFENCES PUNISHABLE MORE SEVERELY ON ACTIVE SERVICE THAN AT OTHER TIMES.

1. (*a*) Leaves commanding officer to plunder. A.A. 6.

(*b*) Leaves guard, picquet, patrol or post without orders.

(*c*) Forces a safeguard.

(*d*) Forces or strikes a sentry.

(*e*) Impedes or refuses to assist the provost marshal or officer or N. C. officer acting on his behalf.

(*f*) Does violence to bringer of supplies, commits any offence against property or person of any inhabitant of the country.

(*g*) Breaks into house or place for plunder.

(*h*) *Intentionally* causes false alarms of discharging firearms, beating drums, making signals, etc.

(*i*) Treacherously makes known parole, watchword, or countersign.

(*j*) Irregularly appropriates supplies.

(*k*) Being a sentinel:—

(1) Sleeps or is drunk on his post.

(2) Leaves his post before he is regularly relieved.

Punishment—
- *On Active Service*.....DEATH.
- *Not on Active Service*
  - *Officer*—CASHIERING.
  - *Soldier*—IMPRISONMENT.

2. (*a*) Negligently causes false alarms by discharging firearms, etc.

(*b*) Makes known parole, watchword, or countersign to a person not entitled to receive it, etc.

Punishment
- *Officer*—CASHIERING.
- *Soldier*—IMPRISONMENT.

The term "post" in A. A. 6 (1. b) is used in a different signification from that which it bears in Sub-section 1. [*k*. (1.2.)] In the former it means any duty on which posted, except sentry, and it must be proved that he left it without leave.

A sentry sleeping or drunk on his post, or leaving it before being regularly relieved. To convict under this section the

evidence that the man was posted with sufficient ceremony must be complete and is essential; the charge must therefore describe the post. The soldier who has posted himself is not deemed posted.

MUTINY AND INSUBORDINATION.

MUTINY AND SEDITION.

A.A. 7. 1. Causes or conspires to cause mutiny or sedition in H. M. forces or navy.

2. Endeavours to seduce, or persuade, others in above forces to join a mutiny or sedition.

3. Joins in, or does not do his best to suppress, a mutiny or sedition.

4. Comes to knowledge of an intended mutiny or sedition, and does not at once report it.

Punishment—DEATH.

STRIKING OR THREATENING SUPERIOR OFFICER.

A. A. 8. 1. Strikes, uses, or offers violence to his superior officer *being in the execution of his office.*

Punishment—DEATH.

2. Strikes, uses, or offers violence to his superior officer, or uses threatening or insubordinate language to him.

Punishment—
- *On Active Service*.....PENAL SERVITUDE.
- *Not on Active Service*—
  - *Officer*—CASHIERING.
  - *Soldier*—IMPRISONMENT.

DISOBEDIENCE TO SUPERIOR OFFICER.

A. A. 9. 1. Disobeys in such manner as to show wilful defiance of authority any *lawful* command given *personally* by his superior officer *in the execution of his office*, whether given orally, in writing, or by signal.

Punishment—DEATH.

2. Disobeys any *lawful* command given by his superior officer.

Punishment—
- *On Active Service*.....PENAL SERVITUDE.
- *Not on Active Service*—
  - *Officer*—CASHIERING.
  - *Soldier*—IMPRISONMENT.

INSUBORDINATION.

A.A.10. 1. Being concerned in a fray, or disorder, refuses to obey any officer (though of inferior rank) who orders him into arrest, or strikes or offers violence to such officer.

2. Strikes or offers violence to any person, whether subject to military law or not, in whose custody he is placed, whether he is or is not his superior officer.

3. Resists an escort whose duty it is to apprehend him, or have him in charge.

4. Being a soldier, breaks out of barracks, camp or quarters.

Punishment { *Officer*—CASHIERING. / *Soldier*—IMPRISONMENT.

NEGLECT TO OBEY GARRISON OR OTHER ORDERS.

A.A.11.

Neglects to obey any general or garrison or other orders.

Punishment { *Officer*—CASHIERING. / *Soldier*—IMPRISONMENT.

"General Orders" does not include the Queen's Regulations or any similar orders published for the general information and guidance of the army.

DESERTION, FRAUDULENT ENLISTMENT, AND ABSENCE WITHOUT LEAVE.

DESERTION.

1. (*a*) Deserts or attempts to desert.

A.A.12.

(*b*) Persuades, endeavours to persuade, others to desert.

Punishment { *On Active Service, Or under orders for Active Service.* — DEATH. / *Under other circumstances.* — *1st Offence*—IMPRIS'MENT. *2nd Offence*—PENAL SERVT.

2. An offender may be charged with any number of offences under this section at the same time. The severer punishment can only be awarded on conviction of a second offence.

3. A previous offence of fraudulent enlistment counts as a previous offence for awarding the higher punishment.

FRAUDULENT ENLISTMENT.

1. (*a.*) When belonging to the regular forces, or the militia when embodied, without having been first regularly discharged, enlists in the regular forces.

A.A.13.

(*b.*) When belonging to the regular forces improperly en-

lists or enrols himself in the militia, reserve forces, or Royal Navy.

Punishment { *1st Offence*—IMPRISONMENT. / *2nd Offence*—PENAL SERVITUDE.

2. Any number of fraudulent enlistments may be tried at the same time.

3. A previous offence of desertion or attempting to desert counts as a previous offence for awarding the higher punishment.

A man belonging to one regiment enlisting in another is now tried for "fraudulent enlistment," not desertion as was formerly the case.

The term "Fraudulent Enlistment" is confined exclusively to improper enlistment under Sec. 13. Any other fraudulent entry or re-entry into the service comes under Sec. 32 or 33.

If a reserve man or militiaman at the time of his improper enlistment is not subject to military law he would be tried under Sec. 33 for making a wilfully false statement on attestation.

PERSUASION OF OR CONNIVANCE AT DESERTION.

A.A.14. 1. Assists another to desert.

2. Connives at desertion by not reporting an intending deserter or not apprehending him.

Punishment—IMPRISONMENT.

ABSENCE FROM DUTY WITHOUT LEAVE.

A.A.15. 1. Absents himself without leave.

2. Fails to appear at parade, or leaving it without permission.

3. Goes beyond fixed limits of camp or garrison without a pass. (Soldiers only.)

4. Absents himself from school without leave. (Soldiers only.)

Punishment { *Officer*—CASHIERING. / *Soldier*—IMPRISONMENT.

DISGRACEFUL CONDUCT.

SCANDALOUS CONDUCT OF AN OFFICER.

A.A 16. Behaves in a scandalous manner, unbecoming the character of an officer and a gentleman.

Punishment—"SHALL BE CASHIERED."

The insertion of the word "scandalous" renders cashiering obligatory, and therefore the term should only be used for heinous offences so as not to fetter the court. For non-specified offences in ordinary cases a charge should be worded under Sec. 40.

FRAUD BY PERSONS IN CHARGE OF MONEYS OR GOODS.

Being charged with or concerned in the care or distribution of public or regimental money or goods—steals, fraudulently misapplies, or embezzles the same, or connives at so doing, or wilfully damages any such goods. A.A.17.

Punishment—PENAL SERVITUDE.

This section is intended for paymasters, storekeepers, pay-sergeants and persons in special positions of trust, not for minor offences such as a soldier destroying ammunition, etc.

DISGRACEFUL CONDUCT OF A SOLDIER.

1. Malingers, feigns, or produces disease.

2. Wilfully maims or injures himself or any other soldier, or causes himself to be maimed, with intent to render himself or other soldier unfit for service. A.A.18.

3. Is wilfully guilty of any misconduct, or wilfully disobeys any orders, by means of which disease is aggravated, or cure delayed.

4. Steals or embezzles, or receives knowing them to be stolen or embezzled, money or goods the property of a comrade, an officer, or any regimental institution, or any public money or goods.

5. Is guilty of any other offence of a fraudulent nature, or of any disgraceful conduct of a cruel, indecent, or unnatural kind.

Punishment—IMPRISONMENT.

A court of inquiry is always held on a man becoming injured in any way.

DRUNKENNESS.

DRUNKENNESS.

Drunkenness whether on duty or not on duty. A.A.19.

Punishment { *Officer*—CASHIERING. / *Soldier*—IMPRISONMENT, *(and in addition to or in lieu of other punishment a* FINE *up to one pound.)*

A soldier drunk on sentry should be tried under Section 6.

OFFENCES IN RELATION TO PRISONERS.

PERMITTING ESCAPE OF PRISONER.

A.A.20. 1. When in command of a guard, post, etc., improperly releases prisoner, whether wilfully or not.

2. Wilfully, or without reasonable excuse, allows escape of a prisoner.

Punishment { *If act be wilful*—PENAL SERVITUDE.
Otherwise —IMPRISONMENT.

IRREGULAR IMPRISONMENT.

A.A.21 1. Unnecessarily detains a prisoner in arrest or confinement without bringing him to trial, or fails to have his case investigated.

2. Having committed a person to the custody of any N. C. officer or provost marshal, fails to deliver at the time or within twenty-four hours an account in writing signed by himself of offence charged.

3. Being in command of a guard, does not give to proper authority the charge against a prisoner as soon as relieved, or within twenty-four hours.

Punishment { *Officer* —CASHIERING.
Soldier—IMPRISONMENT.

The usual time within which a prisoner should be brought to trial is eight days, a longer delay must be specially reported and explained, A. A. 45.

ESCAPE FROM CONFINEMENT.

A.A.22. Breaks arrest or escapes from confinement, or attempts to escape.

Punishment { *Officer* —CASHIERING.
Soldier—IMPRISONMENT.

OFFENCES IN RELATION TO PROPERTY.

CORRUPT DEALINGS IN RESPECT OF SUPPLIES TO F CES.

A.A.23. 1. Connives at exaction of exorbitant price for a house or stall let to a suttler.

2. Lays any duty upon, or takes any fee in respect of, or is in any way interested in, the sale of provisions or merchandise

brought into any garrison, camp, barrack, etc., in which he has any command or authority, or the sale or purchase of any provisions or stores for H. M. forces.

Punishment—IMPRISONMENT.

DEFICIENCY IN AND INJURY TO EQUIPMENT.

1. Makes away with, or is concerned in making away with (whether by pawning, selling, destruction or otherwise) his arms, equipments, clothing, necessaries, or any horse of which he has charge. A.A.24.

2. Loses by neglect any of the above.

3. Makes away with (in any way) any military decoration.

4. Wilfully injures anything before mentioned, or any property belonging to a comrade, or an officer, or regimental institution, or any public property.

5. Ill-treats any horse used in the public service.

Punishment—IMPRISONMENT.

Attempting to sell, or offering for sale, cannot be tried under this section, but may be tried under Sec. 40.

A soldier cannot be charged with losing a medal but only for making away with one.

A soldier cannot be tried for making away with a medal if he has been discharged since he obtained the medal and has again enlisted; for on discharge the medal became his private property.

OFFENCES IN RELATION TO FALSE DOCUMENTS AND STATEMENTS.

FALSIFYING OFFICIAL DOCUMENTS AND FALSE DECLARATIONS.

1. In any report, return, muster roll, pay list, or other document signed by him, or of which it is his duty to ascertain the accuracy:— A.A.25.

(*a.*) Knowingly makes or is privy to making any false or fraudulent statement.

(*b.*) Knowingly makes or is privy to making any omission with intent to defraud.

2. Knowingly and with intent to defraud or injure any person suppresses, defaces, alters, or makes away with any document which it is duty to preserve or produce.

3. Where it is his official duty to make a declaration respecting any matter, knowingly makes a false declaration.

Punishment—IMPRISONMENT.

NEGLECT TO REPORT, AND SIGNING IN BLANK.

A.A.26. 1. When signing any document relating to pay, arms, clothing, necessaries, provisions, furniture or any stores, leaves in blank any material part for which his signature is a voucher.

2. Refuses or by culpable neglect omits to make or send a report or return which it is his duty to do.

Punishment { *Officer*—CASHIERING. *Soldier*—IMPRISONMENT.

With regard to false returns it must be proved that the return was false, that the prisoner knew it to be false, and that the person calling for the return was authorised to demand it.

FALSE ACCUSATION, OR FALSE STATEMENT BY SOLDIER.

A.A.27. 1. Being an officer or soldier, knowingly makes a false accusation against any other officer or soldier.

2. Being an officer or soldier, in making a complaint where he thinks himself wronged, knowingly makes any false statement affecting the character of an officer or soldier, or suppresses material facts.

3. Being a soldier, falsely states to his C. O. that he has been guilty of desertion, or of fraudulent enlistment, or has served in and been discharged from any regular or other forces, or the navy.

4. Being a soldier, makes a wilfully false statement in respect of prolongation of furlough.

Punishment—IMPRISONMENT.

Furlough may be considered to include a "pass."

OFFENCES IN RELATION TO COURTS MARTIAL.

A.A.28. 1. Being duly summoned or ordered to attend a C. M. as a witness, makes default.

2. Refuses to take an oath or make a solemn declaration legally required.

3. Refuses to produce any document legally required.

4. Refuses when a witness to answer any question legally required.

5. Is guilty of contempt of court by using insulting or threatening language, or by causing interruption or disturbance.

Punishment { *Officer*—CASHIERING.
{ *Soldier*—IMPRISONMENT.

But such punishment can only be awarded on conviction by C. M. other than the court before which the offence was committed; but instead of the offender being so tried by another C. M., the court may itself award imprisonment up to twenty-one days. Civilians are to be attached by the President to a Civil Court having power to punish for contempt. See A. A. 126.

FALSE EVIDENCE.

When examined on oath or solemn declaration before a C. M. or any court or officer authorised by the Act to administer an oath, wilfully gives false evidence. A.A.29.

Punishment—IMPRISONMENT.

OFFENCES IN RELATION TO BILLETING.

1. Is guilty of any ill-treatment by violence, extortion, etc., of the occupier of a house in which any person or horse is billeted. A.A.30.

2. An officer who refuses to cause compensation to be made for the same.

3. Fails to meet the just demands of the person on whom any person or horse is billeted.

4. Wilfully demands billets not actually required for those entitled to be billeted.

5. Takes, or knowingly suffers to be taken, from any person any money or reward to relieve him of his liability as to billeting.

6. Uses or offers any menace to or compulsion on a constable to make him give billets contrary to the Act, or to discourage him from doing his duty.

7. Uses or offers any menace or compulsion on any person tending to oblige him to receive, without his consent, any person or horse not duly billeted.

Punishment { *Officer*—CASHIERING.
{ *Soldier*—IMPRISONMENT.

OFFENCES IN RELATION TO IMPRESSMENT OF CARRIAGES.

1. Wilfully demands any carriages, animals, or vessels, not actually required for purposes authorised in the Act. A.A.31.

2. Fails to comply with the Act as regards payment of sums due, and weighing of the load.

3. Constrains any carriage, animal, or vessel, to travel against the will of the person in charge beyond the proper distance, or carry a greater weight.

4. Does not discharge as speedily as practicable, any carriage, etc., impressed.

5. Compels any person in charge, or permits him to be compelled, to take any baggage or stores not entitled to be carried, or any soldier or servant (except such as are sick), or any woman or person.

6. Ill-treats or permits such person in charge to be ill-treated.

7. Uses or offers any menace to or compulsion on a constable to make him provide any carriage, etc., contrary to the Act, or to discourage him from doing his duty.

8. Forces any carriage, animal, or vessel, from the owner.

Punishment { *Officer*—CASHIERING. *Soldier*—IMPRISONMENT.

OFFENCES IN RELATION TO ENLISTMENT.

ENLISTMENT OF SOLDIER OR SAILOR DISCHARGED WITH IGNOMINY OR DISGRACE.

A.A.32. 1. A soldier or sailor discharged with ignominy or disgrace, who re-enlists without declaring the circumstances of his discharge.

Punishment—PENAL SERVITUDE.

2. The above includes discharge with ignominy, discharge as incorrigible and worthless, or discharged on account of a conviction for felony or of a sentence of penal servitude.

FALSE ANSWERS OR DECLARATIONS ON ENLISTMENT.

A.A.33. Wilfully makes false statement on attestation.

Punishment—IMPRISONMENT.

GENERAL OFFENCES IN RELATION TO ENLISTMENT.

A.A.34. 1. Is concerned in enlisting a man when he knows, or has reasonable cause to believe, such man to be so circumstanced that by enlisting he commits an offence against the Act.

2. Wilfully contravenes laws relating to enlistment or attestation.

Punishment—IMPRISONMENT.

MISCELLANEOUS MILITARY OFFENCES.

TRAITOROUS WORDS.

Uses traitorous or disloyal words regarding the Sovereign. A.A.35.

Punishment { *Officer* —CASHIERING.
Soldier—IMPRISONMENT.

INJURIOUS DISCLOSURES.

Whether serving with any of H. M. forces *or not*, discloses the number or position of any forces or stores, or any preparations or orders relating to operations or movements of any forces as to produce effects injurious to Her Majesty's service. A.A.36.

Punishment { *Officer* —CASHIERING.
Soldier—IMPRISONMENT.

This does not apply to *traitorous* disclosures which come under Sections 4 or 6, but to meet such cases as writing improperly to newspapers or even private letters to friends as they could not be certain that the letter would not fall into the hands of the enemy. To obtain a conviction under this section however it must be proved that the *particular* letter in question produced injurious effects, a thing difficult to prove.

ILL-TREATING SOLDIER.

1. Strikes or otherwise ill-treats any soldier.

2. Having received the pay of any officer or soldier, unlawfully detains or refuses to pay the same when due. A.A.37

Punishment { *Officer* —CASHIERING.
Soldier—IMPRISONMENT.

DUELLING AND ATTEMPTING TO COMMIT SUICIDE.

1. Fights, or promotes, is concerned in or connives at fighting a duel. A.A 38.

2. Attempts to commit suicide.

Punishment { *Officer* —CASHIERING.
Soldier—IMPRISONMENT.

REFUSAL TO DELIVER TO CIVIL POWER OFFICERS AND SOLDIERS ACCUSED OF CIVIL OFFENCES.

On due application made to him neglects or refuses to deliver over to the civil magistrate, or to assist in the lawful appre- A.A.39.

hension of any officer or soldier accused of an offence punishable by civil court.

Punishment { *Officer* —CASHIERING.
Soldier—IMPRISONMENT.

It must be proved that the demand for his delivery was *legally* made; e. g., if the magistrate has no jurisdiction to try him for an offence except on the request of the military authorities, the C. O. is not liable to be prosecuted under this Section, or Section 162, for refusing to deliver up the man thus illegally demanded.

CONDUCT TO PREJUDICE OF MILITARY DISCIPLINE.

A. A. 40. Is guilty of any act, conduct, disorder, or neglect, to the prejudice of good order and military discipline.

Punishment { *Officer* —CASHIERING.
Soldier—IMPRISONMENT.

But no person is to be charged under this Section for any offence for which special provision is made in the Act, and which is not a civil offence; nevertheless the conviction of a person so charged is not invalid unless any injustice has been done by the contravention of this proviso.

If any doubt should arise whether an offence is or is not a specific crime under another part of the Act, the offence may be charged as such specific crime, and also as an offence under this section, but then of course the court must acquit the prisoner of one of the charges.

OFFENCES PUNISHABLE BY ORDINARY LAW.

A.A.41. Subject to the restriction that the jurisdiction of Civil Courts is not to be interfered with, the Act gives absolute jurisdiction to a C. M. to try any civil offence, as a C. M. may try any offence of a felonious or fraudulent nature, or of any offence "to the prejudice of good order and military discipline" which term embraces nearly all civil crimes—with the important exception however, that a C. M. cannot try treason, murder, manslaughter, treason-felony, or rape committed in the U. K., or any where in H. M. dominions (other than the U. K. and Gibraltar) except on active service, or at places more than one hundred miles as measured in a straight line from a city or town where the offender can be tried by a competent civil court.

When these offences are tried by C. M. the following punishments can be given on conviction :—

1. *Treason*
2. *Murder*
} DEATH.

3. *Manslaughter*, *Treason-felony*,
4. *Rape*.....
} PENAL SERVITUDE.

5. In England or elsewhere any other offence not specified in the Act as a military crime and which is punishable by the law of England may be tried by C.M., and either such punishment given as could be given for an act to the prejudice of good order and military discipline (under Section 40), or such punishment as the law of England awards for the offence.

For this some reliable work on Civil Criminal Law must be referred to.

A person subject to military law when in H. M. dominions may be tried by any competent civil court for any offence for which he would be triable if he were not subject to military law.

Civil offences can be tried by *any* C. M. competent to try the offender, but the court cannot give a greater punishment than lies within its ordinary powers. A. A. 47.(6)

RESTITUTION OF STOLEN PROPERTY.

A. A. 75.

Where a person has been convicted by C. M. of having stolen, embezzled, or otherwise unlawfully obtained any property, any part of which is found in the possession of the offender, the Confirming Officer, or the C. in C., may order such property to be restored to the rightful owner.

DEFINITION OF CERTAIN CRIMES AND LEGAL TERMS.

A crime has been defined as "an action which the law has forbidden and to which it assigns a punishment."

This definition is however imperfect as the commission of such an action does not necessarily constitute a crime, for *will* and *intention* are the essential elements of every crime: no action is criminal in itself unless the *intent* involves a state of mind forbidden by law. Hence to render an action punishable it must be done *purposely* and

with intent to bring about the results which ensued.

If a person kills another, he is not guilty of felony unless there was a specific intent to do harm or commit murder. Killing is not murder unless there be malice. The appropriation of another's property is no theft unless the action is felonious.

The word "malice" is frequently used in legal phraseology and means evil intent, and malice is deemed a necessary ingredient in one form or another of all crimes.

Malice is defined as always accompanying "a wrongful act done intentionally without just cause or excuse."

But the law presumes every man to contemplate the natural and necessary consequence of his own acts until he shows justification or excuse; thus when an action forbidden by law has been committed the law assumes "malice" and throws on the accused the onus of clearing himself, and it is for the latter to disprove malice by showing justification or excuse.

"When the act is in itself unlawful, the proof of justification or excuse lies with the accused, in failure whereof the law implies criminal intent."

This is carried still further, for when the action is felonious a person is answerable for the consequences even though not intended. Thus if a man is intentionally about to commit a felony and undesignedly kills another man this is murder in the eyes of the law. Also on one occasion some men placed a barrel of some explosive compound against a prison wall in the street, lit the fuze, and ran away. Several people walking in the street were killed or hurt; the criminals, although not intending to hurt these individuals, were tried and convicted for the results of their unlawful proceedings.

This principle applies also to crimes of wilful and intentional omission, which in the eye of the law is equal to wilful and intentional commission; thus a woman suffering her helpless child to perish through neglect is guilty of murder.

A certain amount of culpable negligence is also held to

constitute "evil intent" and make the act criminal though in a lower degree, as neglect on the part of a signalman on a railway.

Whenever the "evil intent" is not expressed by the word describing the crime such word must be qualified; e. g., "stealing" does express unlawful intent, but receiving stolen goods does not as it might have been done unwittingly, therefore the charge should be "receiving *knowing* them to have been stolen."

Misfortune or Chance.—If an accidental mischief happen from the performance of a lawful act, the party stands excused from all guilt; but if the act be unlawful he is then answerable for the consequences; e. g., if a soldier at target practice miss the target and accidentally kill a bystander, he is not guilty of any crime, but if a man fire out of a window in a town at a dog in the street, and accidentally kill a person, he would be guilty of manslaughter.

Compulsion, in such cases as a man being compelled to join mutineers on pain of immediate death if he attempted to leave them, would be a defence.

Insanity.—If insanity be pleaded as an excuse the court must be satisfied of "an absolute dispossession of the free and natural agency of the human mind;" if the accused has lucid intervals and reason sufficient to know right from wrong, he is answerable for what he does in those intervals.

Judges have laid down that "if the accused was conscious that the act was one which he ought not to do, and if the act was contrary to the law of the land, he is punishable." If he has delusions, he must be judged as if those delusions were true; e. g., if in delusion he believed another man to be trying to take his life and in imaginary self-defence he killed that man, he could not be convicted for murder; but if he thought that the other man had wrongfully got his estate and under this impression killed him he would be liable to punishment.

CIVIL OFFENCES.

A principal in the first degree is the absolute perpetrator of a crime.

A principal in the second degree is one who is present aiding and abetting; the presence need not be an actual standing by but may be a constructive presence.

Constructive Presence.—If several persons go out together to perpetrate in common some unlawful act and each takes the part assigned him, some to do the deed, others to watch or to favour the escape of those actually committing the deed, all are, in the eye of the law, present at the deed if it be done.

An accessory before the fact is one who procures, advises, or commands another to commit a felony and is absent at the time of the felony being committed.

An accessory after the fact is one who receives, relieves, comforts or assists a felon, knowing him to be such.

Accessories may be indicted and convicted as accessories "before" or "after the fact" together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted or shall or shall not be amenable to justice.

Treason is defined to be an offence against the security of the Queen and Her Dominions.

Treason-Felony.—The Statute has declared such crimes as:—Intention to depose the Sovereign, or place duress upon him in order to compel him to change his counsels, or to intimidate Parliament, as felonies, and such a crime is therefore called a "*treason-felony.*"

Misprision of Treason consists in the bare knowledge and concealment of treason without any degree of consent thereto. The punishment for this crime is loss of the profits of lands during life, forfeiture of goods, and imprisonment during life.

Felony and Misdemeanor.—There is no exact defini-

tion of felony, and it has been considered injudicious to make a distinction between felony and misdemeanor, yet the Statute distinctly calls certain crimes felonious, and lays down certain rules respecting felony.

Felony is defined by Sir W. Blackstone to be, "an offence which occasions a total forfeiture of either lands or goods or both, at Common Law, and to which capital or other punishment may be superadded according to the degree of guilt."

The principle felonies pronounced so by Statute are:—Murder, manslaughter, attempt to murder, wounding with intent to do bodily harm, theft, burglary, housebreaking, rape, arson, forgery and embezzlement.

The term *Misdemeanor*, in its legal acceptation, is confined to such indictable offences as do not amount to treason or felony; such as perjury, libel, conspiracy, public nuisances, etc.

Felony necessarily involves forfeiture of goods, misdemeanor does not. Any person may arrest another on reasonable suspicion of felony and the arrested man has no redress, but a person accused of misdemeanor cannot even be arrested by a constable without a warrant.

A second conviction of felony empowers a Judge to award 10 years P. S., whereas repeated acts of misdemeanor are only punishable by 5 years P. S. although the latter may be a worse crime than a minor act of felony; in such a case the Judge sometimes overrules the case on his own authority. Also a person accused of felony has a right to challenge a jury without showing cause up to twenty jurors, and after that to any number with showing cause, whereas in cases of misdemeanor he must show cause to every objection. Further, any necessary force, even to taking life, may be used to detain a convicted felon in custody, but not so for misdemeanor. Thus if a sentry shoot a man, convicted of the latter, attempting to escape he may be tried for manslaughter, but not if he be a felon.

Misprision of felony is the concealment of a felony which a man knows of without assenting to it.

Homicide may be either felonious, justifiable, or excusable; in either of the two latter cases no penalty is incurred.

Homicide is excusable when by accident while engaged in a lawful act. It is justifiable when imposed by law, or when a person having committed or being charged with a felony will not suffer himself to be arrested, in cases of riot, or to prevent any forcible or atrocious crime, etc. There must, in all these cases, be an apparent necessity for the homicide to render it justifiable.

Felonious homicide is divided into murder and manslaughter.

Murder is the unlawful killing of a human being with malice aforethought, the malice being any felonious intent.

Manslaughter is the unlawful killing of another without any malice, and may be either voluntary upon a sudden provocation, or involuntary when engaged in some unlawful act.

A.A.18. *Theft* is known to the ordinary criminal code as "larceny," and it has been defined as "the wrongful or fraudulent taking and carrying away by one person of the mere personal goods of another with the *felonious intent* to convey to the taker's own use and make them his own property, without the consent of the owner."

The taking must not only be wrongful but wilfully wrongful, for if the accused believed in his mind that he had a right to take the goods, and took them in good faith, it is not theft. To prove theft the intent must therefore be shown, and it must also be shown that the goods taken are the property of the owner specified. For this purpose property is said to belong to the person who is lawfully charged with it, as an officer in charge of any government property, postmaster, washerwoman, etc.

Thus to constitute larceny there must be:—

1st a felonious taking,

2d a felonious carrying away, and

3d. It must be proved that the goods stolen are actually or constructively the property of the person named in the indictment or charge.

With reference to proving "carrying away" it has been ruled that to handle a bale of goods is not theft, but to turn them over and lift them up is sufficient provided the *intent* is thereby proved.

Formerly the criminal code recognized two kinds of larcenies:—

1st., simple larceny; 2nd., compound larceny.

The latter had to be accompanied by circumstances of aggravation, such as stealing from a house or from a person with violence (garotting); but now all larcenies are deemed of the same nature.

By C. M. only two years imprisonment can be awarded with stoppages and discharge with ignominy; but by civil law larceny can be punished more severely. But a C. M. can put a soldier under stoppages to make good stolen property which a civil court cannot. It is for this reason that at C. M. the value of articles stolen must be specified in the charge.

Embezzlement is different from ordinary theft, it being a breach of *trust* as well as a *fraud* and is a *felony*; it is consequently a more serious crime than ordinary theft and can be punished with P. S. Embeszlement is defined as "The fraudulently converting to one's own use property received, taken possession of, or held for another." A.A.17.

If theft be charged and embezzlement proved a prisoner can be found guilty of embezzlement. This is an exception to the ordinary rule that a person tried for a minor offence cannot be convicted of a severer one. A.A.56.

Fraudulently misapplying is misappropriating money or property entrusted to a person for custody or use for some particular purpose, and which that person diverts from that purpose to his or her own purposes.

A pay-sergeant making away with company money comes under this head of fraudulently misapplying. He

is liable for embezzlement like any other person if he make away with any *other* sum such as, say, money received for a cheque given to him to cash. So a canteen sergeant may be tried for fraudulently misapplying canteen money. If it cannot be proved it was done fraudulently he may be tried under Section 40 for having "negligently discharged his duty as to cause a loss to the canteen fund of.....or thereabouts."

If theft be committed by a soldier from a military person he would generally be tried by C. M. unless there are
Q.R. VI.71. peculiarly complicated circumstances in connection with the case; if from a civilian he would be tried by a civil court.

Robbery is the felonious and forcible taking of any property from the person of another, or in his presence against his will. A person charged with robbery may be convicted only of an assault with intent to rob.

Burglary is a breaking and entering by night the dwelling house of another with intent to commit felony within the same, whether the felonious intent be executed or not. The night, in England or Canada, is considered to be from 9 P. M. to 6 A. M., so far as burglary is concerned.

Arson is the wilful and malicious burning of a house, whether the house be the offender's or another's.

A.A.18. *Forgery* is the false making, altering, or adding to any writing or document with intent to defraud.

Forgery must be "with intention to defraud." Writing another man's name is not forgery unless with such intention. There is no particular section for forgery in the Act but it could be tried under Section 18 as an offence of a fraudulent nature. It is not necessary to allege or prove an intention to defraud any particular person.

A.A.20. *Perjury* is defined to be "a wilful false oath by one who, being lawfully required to depose the truth in any judicial proceeding, swears absolutely in a matter *material* to the point in issue whether he be believed or not."

A solemn declaration, when authorized, is equivalent to an oath.

One witness is sufficient to prove the taking of the oath, but two witnesses are necessary to prove the oath to be false.

Perjury is not a felony, but a misdemeanor. To bring this crime under the Act the oath must be authorized and required to be taken by the Act. The court therefore must have jurisdiction in the cause in which the perjury is committed, otherwise the offender cannot be lawfully required to swear to the truth.

The swearing must be *absolute*. If a witness speaks to the best of his belief and it is accepted, and it can be shown that he had knowledge to the contrary, he could still be indicted for perjury.

The statement must be *wilful* and not due to any mistake, surprise or inadvertency.

The matter must be *material to the issue*. This means that the statement must have a tendency directly or indirectly to influence the trial; immaterial statements are not triable for perjury.

In a Criminal Court perjury is punishable with P. S., but under the Act only with imprisonment.

MILITARY OFFENCES.

Forcing a safeguard.—A safeguard is a kind of protection to persons or property granted by the C. O. of troops to inhabitants and guaranteed by the presence of one or more soldiers, or officer, specially allotted for that purpose. A.A.6.

A safeguard is not in any way synonymous with sentinel, but the crime of forcing a safeguard is a contemptuous violation of the orders of the General bringing his honour into disrepute. The idea is that the General having granted a safeguard for the protection of the lives and property of inhabitants, his honour is touched if it is forced by one of his own soldiers.

Mutiny and Sedition.—Mutiny is a joint act committed more or less in conjunction with others, as *one* man cannot mutiny; it implies extreme and collective insubor- A.A.7.

dination or rising against or resisting military authority in combination or simultaneously, with or without actual violence, such acts generally proceeding from alleged or pretended grievances of a military nature.

A single individual can only be guilty of insubordination; but a single individual may create, cause, or excite a mutiny or conceal the knowledge of an intended mutiny, and these are offences as grave as actual mutiny.

Mutiny and Sedition must be proved by *acts* not words alone. An *intention* on the part of the offenders to rise against constituted authority must be proved.

The term "mutinous conduct," which implies conduct tending to mutiny, is not a crime recognized in the Act but would be charged as insubordination.

Sedition.—The difference between sedition and mutiny is not very clear, yet sedition is generally considered as treasonable or riotous acts committed by soldiers against the Government or civil authorities rather than against military superiors, though necessarily involving or resulting in insubordination to the latter.

Insubordination.—All offences, in Sections 8, 9, 10 and 11 come under this heading and some under Section 7.

To constitute the offence of "offering violence" there must be an overt act, *i. e.*, a real attempt to use violence which would have taken effect but for some preventative cause. A mere threat or gesture, such as shaking the fist, is not an offer of violence unless within striking distance of the person threatened.

A man raising his fist to strike in the orderly room would be an offer of violence, but shaking his fist out of a window in an upper story is not. A man aiming out of a window with a loaded rifle is an offer of violence. The term "superior officer" includes all N. C. officers.

The insubordination, whether of act or word, must be precisely set forth in the charge. It is to be observed that the insubordinate language must be used *to* not *of* the superior officer; insubordinate language *of* him, in his absence, could only be tried under Section 40.

The term "*execution of his office*" applies more particularly to officers and N. C. O.'s being on duty at the time the offence was committed. N. C. O.'s, however, being continuously in uniform, it is laid down that they are, while with the regiment or any portion of it, always to be considered on duty. There has always been a doubt as to whether officers dressed in plain clothes could be considered as on duty. This is provided for in the Act by making the same crimes to a superior (not in the execution of his office) military offences, though not of so serious a nature. Could it be proved, however, that the officer in plain clothes was known to the offender he would in giving an order be deemed to be in the execution of his office. A.A.8.

Provocation is not by law recognized as justifying an act; but, if proved, it would of course influence the court in their sentence.

Disobeying the lawful command of a superior officer.—No offences differ so much in degree as those falling under the general description of insubordination. An offence of that class may be of the most trivial character, or may amount to an offence of the most serious description amounting, if two or more persons join in it, to absolute mutiny. A.A.9.

Almost any offence, from one minute late for tattoo, might be called disobedience of orders, but great care must be used in discriminating between, "*neglect of duty*" or "*neglect of orders*" Section 11, and "*disobedience of orders*" Section 9.

Under this heading there are two distinct offences specified. The essential ingredients of the graver offence are that it should show *a wilful defiance* of authority, and should be disobedience of a *lawful* command given *personally by a superior officer in the execution of his office*. Each of these particulars must be proved before the prisoner can be convicted of the graver offence of disobedience. The lesser offence consists of disobedience to any lawful command given by a superior officer, divested of the special conditions which mark out the greater offence.

For instance, a lesser offence would include disobedience to the lawful command of a superior officer delivered through a third person (who is a proper channel of communication), or in writing. Unless the case is a grave one of direct contumacious or mutinous conduct, or unless an example be required in the general interests of discipline, the lesser offence should be charged.

These apply to *personal orders* not to disobedience of regulations or standing orders which are classed under the heading of neglects, and are punished less severely under Section 11.

Further, the command must be *lawful*, and this offers a wide field for discussion as this implies that it would be lawful in a military sense to disobey the unlawful command of a superior.

This word is inserted to prevent the inferior being ordered to do an act which would render him liable to civil punishment; e. g., an officer engaged in a broil calling on soldiers to take his side. The meaning is that a man is not bound to commit an unlawful act because his military superior tells him to do so, but it is not intended to enable an inferior to argue whether the superior officer had a right to give a certain order or not.

A great authority on Military Law (Simmons) comes to the following conclusion:—"So long as the orders of a superior are not obviously and decidedly in opposition to the well known and established customs of the army, or to the known laws of the land; or, if in opposition to such laws, do not tend to an irreparable result so long must the orders of a superior meet prompt, immediate, and unhesitating obedience."

A.A.12. *Desertion and absence without leave.*—Desertion is defined as "illegal absence from duty without intention of returning." Hence a soldier must not be charged with desertion unless there is clear proof that he has gone away with the intention of leaving H. M. service. Further, even assuming he is charged with desertion, the court that tries him should not find him guilty of desertion unless they are fully satisfied upon the evidence that he has

been guilty of desertion; in any case of doubt the court should find him guilty of absence without leave.

In charging a man with desertion for any short absence without leave it is *necessary that there* should be clear proof of his intention to stay away and abandon his regiment or corps. On the other hand, absence without leave for any considerable time, if not satisfactorily accounted for, is in itself strong presumptive evidence of an intention to desert.

The distinction between the offences of desertion and absence without leave lies in the presumed or proved intention of the offender to return to his duty. As the crime of desertion depends on the absence of any intention to return, the time during which the offender may be away from duty does not necessarily make any difference. A man may be absent for several years and yet not be a deserter, or he may have only just left the barrack gate and yet be one. However clear a man's intention be to desert he cannot be convicted of the crime of desertion unless absence without leave be proved, but he may be convicted of an attempt to desert. For instance, if he offers to enlist in another corps, or embarks on board a ship bound for a distant part of the world, such circumstances may be conclusive evidence of an intention to desert and would be tried as an attempt to desert.

Neither can desertion be judged always by distance. A soldier may absent himself without leave and depart to a considerable distance and yet the evidence of an intention to return may be clear, whereas he may scarcely quit the camp or barracks and the evidence of desertion may be complete.

It has been ruled that a soldier cannot desert while on furlough except by enlisting in another regiment. If illegally absent after the expiration of his furlough then he can of course be tried for desertion, but if found embarking for a distant country during the period of his furlough he would be tried for an attempt to desert.

Section 14 deals with minor offences connected with desertion, as assisting any one to desert or concealing knowledge of desertion. A.A.14.

Q.R.VI.117. The Q. R. prescribe that up to 21 days' absence a man should not be returned as a deserter unless there is ground for supposing he has deserted. After 21 days all absentees without leave, pending investigation, are to be considered as deserters.

Q. R. VI. 117–136 give the rules relating to desertion and offences against enlistment.

A.A.78 When a soldier has been absent without leave for 21 days a court of inquiry of three officers is to assemble, and having received proof on oath the court has to declare the absence and the period thereof and the deficiency, if any, in his kit, and the C. O. will enter a record of the declaration of the court in the regimental books. (See Chap. XIV.)

A.A.78. *Confession of Desertion.*—Where a soldier signs a confession that he has been guilty of desertion, or of fraudulent enlistment, the C. in C., or A. G. in the U. K., or Officer Commanding the forces in any colony, etc., may dispense with his trial and order him to suffer the same forfeitures and deductions of pay as if he had been convicted by C. M. for the offence. If upon such confession, evidence of the truth or falsehood of it cannot then be conveniently obtained, the record of such confession countersigned by the C. O. is entered in the regimental books and the soldier continues to do duty in the corps in which he is serving, or in any other corps to which he may be transferred, until his discharge or transfor to the reserve or until legal proof can be obtained of the truth or falsehood of such confession.

Q.R.VI.28, 121.

With the crime of desertion, attempt to desert, or of absence without leave, is frequently associated that of making away with clothing, equipment or necessaries.

A.A.17.

Fraudulent Enlistment.—This crime is restricted to a person *when subject to military law* enlisting in the regular forces when belonging to the regular, reserve, or militia forces, without having first a regular discharge or having otherwise fulfilled the conditions enabling a man to enlist.

A soldier who absents himself without leave from his corps and enlists in another is charged with fraudulent enlistment not with desertion.

A man of the militia or reserve forces who enlists when not subject to military law would be tried under Section 33 for making a wilfully false statement or answer on attestation. A.A 32, A.A 33.

Men who enlist having been discharged while subject to military law as bad characters, or with disgrace from the navy, are dealt with under Section 32 which is specially framed to meet such cases. A.A.32.

Disgraceful conduct is the heading under which are included in the Act offences by commissioned officers of a scandalous nature unbecoming the character of an officer and a gentleman, and all offences by soldiers of a fraudulent nature not particularly specified in the Act, or of any other disgraceful conduct of a cruel, indecent or unnatural kind. The words "Disgraceful Conduct" in a charge are strictly limited to one of the kind specified in Section 18, sub-section 5. A.A.18.(5)

CHAPTER XI.

FORFEITURES, STOPPAGES, AND FINES.

FORFEITURES.

Forfeitures relate to :—

1. Forfeiture of service towards discharge or transfer to the reserve.

2. Forfeiture of ordinary pay.

3. Forfeiture of service towards pension and of deferred pay.*

4. Forfeiture of good conduct pay and gratuities.

5. Forfeiture of military decorations and rewards.

STOPPAGES.

Stoppages of pay are inflicted for the purpose of making good any articles obtained by fraudulent enlistment, any loss, damage or destruction to any property or goods, or to arms, ammunition, clothing, etc., through misconduct or neglect, also for any medal or decoration made away with or lost by neglect.

FINES.

Fines are only inflicted in the case of drunkenness, for which any C. M. may inflict a fine not exceeding one pound (£1.)

*Besides their ordinary pay, N. C. O.'s and soldiers are credited with "Deferred Pay" at the rate of £3 a year; but, subject to certain exceptions, it is only paid on discharge or on transfer to the Reserve.

The term "fine" is also applied to fines imposed by civil court. A.A. 106-109.

FORFEITURES.

1. FORFEITURE OF SERVICE TOWARDS DISCHARGE.

A soldier convicted of, or who has confessed and his trial been dispensed with for :—

(*a*) Desertion, or (*b*) Fraudulent enlistment—forfeits the whole of his prior service, and is liable to serve for the term of his original enlistment reckoned from the date of conviction or of the order dispensing with the trial.

Service thus forfeited may be restored by the S. of S. for good and faithful service, or on the recommendation of a C. M.

No service is forfeited for any absence nor for any imprisonment.

2. PENAL STOPPAGES FROM ORDINARY PAY.

The pay of an officer or soldier is to be paid without any other deductions than those authorized by the Act or by Royal Warrant. But in case of doubt as to the proper issue of pay or deduction, pay may be withheld until Her Majesty's order respecting it is made known. A.A. 136. A.A. 140(3.)

Officers' pay may be stopped for any days of absence without leave unless a satisfactory explanation has been given through the officer's C. O. and notified as satisfactory by the C. in C. to the Secretary of State; when awarded by C. M. to make good any expenses, loss or damage occasioned by the commission of any offence; or to make good the pay of any officer or soldier which he has unlawfully retained or refused to pay. A.A. 137.

Soldiers' pay is liable to be stopped under the following regulations :—

(1.) For every day of absence during desertion, of absence without leave, or as prisoner of war (unless restored by the S. of S. after due inquiry), or of imprisonment (whether awarded by civil court, C. M. or C. O.), or of detention on A.A. 138. R W.770.

a charge of which he is afterwards convicted, or under detention on a charge for absence without leave for which he is afterwards awarded imprisonment by his C. O.

R.W. 766. In case of absence without leave for a period not exceeding five days the forfeiture may be either enforced or not at the discretion of the C. O. unless the soldier has been convicted of the offence by C. M., in which case his pay is forfeited absolutely for the day or days of absence.

(2.) Pay for days in hospital certified by the medical officer to have been caused by an offence committed by him.

(3.) Sum ordered by a C. M., or on board one of H. M. ships by its C. O., to make good loss, damage, etc., occasioned by misconduct; or, if he has confessed his offence and trial has been dispensed with, such sum as may be awarded by the authority which dispensed with the trial, under A. A. 73.

A.A.73. Where a soldier signs a confession that he has been guilty of desertion or of fraudulent enlistment, a competent officer (C. in C. or A. G. in England, elsewhere C. in C. of forces) may dispense with his trial by C. M., and award the same forfeitures and deductions from pay (if any) as a C. M. could award for the offence.

(4.) Sum awarded by C. O. or C. M., or on board one of H. M. ships by C. O. of ship, to make good any loss, damage, etc., to arms, clothing, necessaries, property, etc.

(5.) If in auxiliary forces before enlistment, sum required to make good any stoppage of pay awarded while in auxiliary forces, etc.

(6.) If liquor ration be stopped by C. O. on board ship, whether commissioned or not, he may be stopped its equivalent in money not exceeding one penny a day for 28 days.

(7.) Sum required to pay a fine awarded by C. M., C. O., or civil court.

(8.) Sum ordered by S. of S. for maintenance of wife or child.

But the total amount of deductions, after paying for messing and washing, must leave the soldier at least one penny a day clear.

Stoppages can only be inflicted to the amount which is sufficient, and no more, to make good any expenses, loss, or damage occasioned. Such amount at a C. M. is stated in the charge and proved in evidence except for articles of kit where the regulation price is recovered.

A C. M. or a C. O. (when case not tried by C. M.), subject to any orders of the S. of S., may remit the whole or any part of the above deductions. A. A.139.

Any sum authorized to be deducted as above may be deducted from ordinary pay, or from any sum due to the officer or soldier, in such manner as may be ordered by the S. of S. A A.140.

In case of stolen property, any money found on the prisoner may be appropriated to restore the sum stolen. A.A.75. Q.R.V.1.93.

For deducting pay for absence or imprisonment a part of a day is not reckoned unless it amounts to six hours or more whether wholly in one day or not, or unless such absence prevented the absentee from fulfilling any military duty which was in consequence thrown upon some other person. A.A. 140 (2.)

A soldier receives no pay on the day of his release from prison. R.W.767.

A soldier acquitted or illegally convicted of a charge, receives all back pay from date on which he was first placed in confinement, except that he is charged for his subsistance during that time and for any hospital stoppages. R.W.768.

A soldier released without trial also receives his back pay except on a confession of desertion or fraudulent enlistment when trial is dispensed with.

3, 4, 5. *FORFEITURE OF SERVICE TOWARDS PENSION, DEFERRED PAY, OF GOOD CONDUCT PAY AND GRATUITIES, AND OF MILITARY DECORATIONS AND REWARDS.*

These have been left in the Act to be dealt with by Royal Warrant as they are in the nature of rewards and not of the essence of a soldier's service. A.A.44.(11)

Any G. C. M. or D. C. M. may, in addition to or without any other punishment, sentence any offender to forfeit:

R.W.583. (*a.*) The whole or any portion of his past service towards pension.

R.W.650. (*b.*) The whole or any portion of deferred pay already earned.

R.W.929. (*c.*) All or any good conduct badges earned by past service.

R.W 912. (*d*) Any medal, decoration, annuity or gratuity.

But no forfeiture is to be awarded by C. M. if the conviction does of itself entail the forfeiture absolutely.

Service forfeited towards pension and good conduct pay, and any medals, decorations, annuity or gratuity forfeited may be restored for subsequent good service by the S. of S. on the recommendation of the C. in C.

R.W.577. Service does not reckon towards pension unless it counts towards the term of enlistment.

R.W.580. A soldier forfeits all prior service towards pension when sentenced by C. M. to be discharged with ignominy, or in consequence of his incorrigible and worthless character, or expressly on account of misconduct, or on conviction by civil power, or on being sentenced to P. S., or for giving a false answer on attestation.

R.W.649, 652. Deferred pay is deducted at the rate of *two pence* (2d) a day for each day on which a soldier forfeits service towards pension. Should such service be subsequently restored the deferred pay is also restored.

For further rules as to forfeitures of pay and as to forfeitures and restoration of medals, good conduct badges, etc., see Royal Warrant.

CHAPTER XII.

VARIOUS REGULATIONS, PENALTIES, &c.

CIVILIAN FALSELY CONFESSING DESERTION.

If any person falsely confesses himself to be a deserter "*he shall* on summary conviction," be sentenced to:— A.A.152.

Imprisonment, with or without H. L., for not more than *three months*.

CIVILIAN ABETTING DESERTION.

Induces a soldier to desert, or aids him to desert, or conceals or rescues a deserter, etc., is liable on summary conviction, to :— A.A.153.

Imprisonment, with or without H. L., for *six months*.

APPREHENSION OF DESERTERS.

If a person be suspected on reasonable grounds of being a deserter, he may be apprehended by a constable A.A.154 (1.) or, if no constable can be immediately met with, by any person (officer or soldier) and forthwith brought before a court of summary jurisdiction. If the court is satisfied that he is a deserter, it may either hand him over to (3.) military custody or commit him to prison till he can be handed over.

In either case it sends a descriptive return :—

In the U. K. to the S. of S.

Elsewhere to the Officer Commanding.

When a person confesses himself to be a deserter to a civil court of summary jurisdiction, the court remands (4.)

(5.) him and transmits a descriptive return (as above) for information as to the truth or falsehood of such confession, and the court may remand him for *eight days* at a time for any reasonable time till such information arrives.

PUNISHMENT OF FALSE OATH AND PERSONATION.

A.A.142.(1.) Where regulations provide for proving the identity of a recipient of any pension, military reward, etc., whether on oath or solemn declaration, persons wilfully making false statements are liable to be convicted of *Perjury*.

(2.) Any person who falsely represents himself to be a particular man in any of the forces is guilty of *Personation*.

(3.) Persons guilty of such offences are liable, on summary conviction, to :—

Imprisonment, with or without H. L., for *three months*, or to,

Fine of *Twenty-five Pounds* (£25).

EXEMPTIONS OF SOLDIERS IN RESPECT OF CIVIL PROCESS.

A soldier cannot be taken out of the service or com-
A.A.144. pelled to appear before a court of law except for felony, misdemeanor, or other crime punishable with fine, imprisonment, or some greater punishment, or for a debt of over *thirty pounds* (£30).

He cannot therefore be made to appear before a Civil Court for breaking a contract, absenting himself from his service, etc.

He can however be sued after due notice given him in writing and, after judgment, execution may be had against any private property of his, but not against his person, pay, arms, necessaries, clothing, etc., which cannot be touched.

LIABILITY OF SOLDIER TO MAINTAIN WIFE AND CHILDREN.

A soldier cannot be punished for deserting his wife or
A.A.145. family ; but a civil court may order a sum for their maintenance, or for that of a bastard child but, as in Section 144, his person, pay, etc., cannot be touched.

The S. of S. may, if he think fit, order a sum not ex-

ceeding *sixpence a day* to be deducted from the pay of a N. C. Officer not under the rank of Sergeant, and *threepence a day* from the pay of any other soldier, for their support.

A summons on a soldier for such a matter is left on his C. O., and sufficient money must be deposited for the soldier to attend and return from the hearing of the case. Any such summons is however ineffectual if he be under orders for embarkation to serve abroad.

EXTENTION OF FURLOUGH IN CASE OF SICKNESS.

A soldier who, from sickness or other casualty, has had his furlough extended by an officer not under the rank of Captain, or by a Justice of the Peace, is not liable to be treated as absent without leave. A.A.173.

*RECRUITS PUNISHABLE FOR FALSE ANSWERS.

A recruit who knowingly makes a false answer at attestation may on summary conviction be sentenced to:— A.A.99

Imprisonment for *three months*,

or if he has been attested he may be so punished or tried by C. M. under Section 33.

DISABILITIES OF OFFICERS.

An officer whilst subject to military law may not act as a justice of the peace to attest soldiers, except militia officers whilst disembodied. A.A.94.

An officer of the regular forces on full pay cannot be sheriff of a county, etc., or mayor or alderman, nor hold any office in any municipal corporation in the United Kingdom. A.A.146.

This does not apply to the auxiliary forces when assembled for annual training. A.A.181.(4.)

EXEMPTION FROM JURY.

Every soldier of the regular forces is exempt from serving on a jury. A.A.147.

OFFICER REFUSING TO AID CIVIL POWER.

An officer who neglects or refuses to deliver over to the civil magistrate any officer or soldier under his command A.A.162 (3.)

*The Rules under Enlistment (Part II of the Act) relating to the Discharge, Tranfer, Prolongation of Service of Soldiers, &c., are dealt with in the Course in Military Administration.

accused of a crime, having regard to A. A. 144 (see above), or who wilfully obstructs or refuses to assist constables in their apprehension is, on conviction, *guilty of Misdemeanor.*

(4.) When an officer is convicted for any offence against the Act by a civil court, a certificate of such conviction is to be sent to the Secretary of State.

PENALTIES.

A.A.98. Penalty for *unlawful recruiting*, liable on summary conviction to :—

Fine not exceeding *Twenty Pounds* (£20).

A.A.111. Officer who improperly demands *billets* is guilty of a *Misdemeanor.*

Officer or soldier who commits an offence in relation to *billeting* punishable under Part I of the Act, but for which no remedy is given by Part II :—

Fine of *Fifty Pounds* (£50).

A.A 118. Officer or soldier who commits a similar offence about *impressment of carriages* :—

Fine not exceeding *Fifty Pounds* (£50), but not under *Two Pounds* (£2.)

A.A.119 (1.) (*a*) Officer or soldier who does not pay for billets or carriages, etc.,

(*b*) or who ill-treats a keeper of victualling house, or owner of carriage, etc., who has first (if possible) complained to the C. O. :—

Such person may apply to a court of summary jurisdiction for compensation; and such court may certify the same to a S. of S. who will order the same to be paid, or, if he think the claim excessive, may order the complaint to go before a county court of summary jurisdiction.

(2.)

A.A 121. Any person making a fraudulent claim to be provided with carriages, animals, billets, etc., is liable on summary conviction to :—

Imprisonment, with or without H. L., for *three months*; or to,

Fine not less than *One Pound* (£1), and not over *Five Pounds* (£5).

A person who trafficks in commissions, promotions, or exchanges, is liable on conviction, on indictment or information to :— A.A.155.

Fine of *One hundred Pounds* (£100), or *Imprisonment* for *six months;* and, if an officer, on conviction by C. M. to be *dismissed the service.*

A person who buys, takes in pawn, or receives, etc., or solicits or assists a soldier in selling, pawning or making away with any arms, necessaries, clothing, stores, horse, etc., is liable on summary conviction to : — A.A.156.

1*st offence*—*Fine* not over *Twenty Pounds* (£20), and treble the value of the property.

2*d offence*—*Fine* not over *Twenty Pounds* (£20), and treble the value of the property, but not less than *Five Pounds* (£5) ; or *Imprisonment*, with or without H. L., for *six months.*

If any such property be found in a person's possession and he cannot satisfactorily account for it, he may be fined *Five Pounds* (£5), or less.

CHAPTER XIII.

COURTS OF INQUIRY, COMMITTEES, AND BOARDS.

A.A.70.(1.) Her Majesty is empowered to make rules, etc., for the assembly and procedure of Courts of Inquiry.

Committees and Boards differ only from Courts of In-
Q.R.VI.115. quiry in so far that the objects for which they are assembled should not involve any point of discipline. They follow, as far as may be convenient, the rules for Courts of Inquiry.

There are three kinds of Courts of Inquiry:—

1. *Royal Commissions*, held under the prerogative of the Crown, instituted by special warrant issued for the occasion, such as to inquire into the failure of expeditions, etc. The proceedings of these courts are privileged being secret proceedings; and oaths are administered under the prerogative of the Crown. The duties of these Commissions are quite undefined but they proceed by the custom of the service and in accordance with their particular instructions.

A.A.72.(1.) 2. *Courts of Inquiry held under the Statute* for the purpose of determining the illegal absence of soldiers.

This court is assembled for the purpose of recording a fact, and is the only one (except Royal Commissions) which can take evidence on oath and which can require the attendance of all necessary witnesses.

It is assembled as soon as practicable after a soldier has been absent without leave for 21 days, unless the soldier, though still illegally absent, has been taken into custody. Q.R.VI.119.

The court is usually composed of three officers who are not themselves sworn, but the court is authorized to administer the same oath or solemn declaration to the witnesses as if the court were a C. M. R.P.121.

The court inquires into the fact of the illegal absence, and will satisfy itself by evidence that the absentee was within a reasonable period of the date of absenting himself in possession of his arms, ammunition, equipments, clothing, regimental necessaries, etc., and also as to any present deficiency (if any) in the above articles. The evidence is taken down in writing and at the end of the proceedings the court is required to declare the period of absence and the deficiencies if any.

The court have to examine all witnesses who may be desirous of coming forward on behalf of the absentee, and in making their declaration have to give due weight to the evidence of such witnesses.

This declaration is then recorded in the regimental C. M. book by the C. O. and signed by him, and should the absentee not afterwards surrender or is not apprehended, such record, or certified copy thereof, has the legal effect of a conviction by C. M. for desertion. The original proceedings are then destroyed. A.A.78.(9) Q.R.XXII. 51. R.P.124.

If he is apprehended or if he surrenders, this record can be produced as evidence of his absence and deficiency of kit.

This court is not to be held on a man of the Army Reserve unless he was subject to military law A. A. 176 (5) at the time of the commission of his offence. Q.R.VI.112.

3. *Ordinary Courts of Inquiry* (or Committees and Boards when not involving questions of discipline) may be held for all kinds of purposes.

They may be assembled by any officer in command of R.P.123.

any body of troops to assist him in arriving at a correct conclusion on any subject on which he may think it ex-
Q.R.VI.109. pedient to be thoroughly informed. He may direct the court merely to collect evidence, or to give an opinion as well on any point *not* involving the conduct of any officer or soldier.

The Queen's Regulations direct the assembly of District or Regimental Courts of Inquiry or Boards to investigate and report on important matters connected with the service.

Q.R.VI.118. In every case of a soldier becoming maimed, mutilated, or injured, except by wounds received in action, a Court of Inquiry assembles to investigate the circumstances and to ascertain whether the injury was caused by accident or design. The court will not give any opinion, but the C. O. will form and record his opinion on the evidence. The proceedings are then sent to the General Officer commanding for confirmation.

Formerly, whenever a soldier became injured even by the merest accident he used to be tried by C. M., but now a C. M. is only convened if the evidence adduced at the court of inquiry shows it to have been wrongful.

Q.R.114. A Court of Inquiry is always held on every returned prisoner of war to investigate the circumstances under which he was taken prisoner. In the case of an officer, the president and members have to make a declaration on their honour that they will impartially inquire into *and*
Q.R.IV.21. *give an opinion* as to the circumstances under which the officer became prisoner of war. The court after sifting the facts is to state its opinion whether his capture is to be attributed to the chances of war or to unofficer-like conduct.

Q.R.XX.14. In the case of a soldier being unable to produce a medal, a board consisting of one captain and two subalterns is to inquire into and record the cause of the loss. The board always takes evidence of character. If the court is of opinion that the man designedly made away with it he is tried by C. M. The public will only supply another if lost accidentally *on duty*. (See Q. R. XX. 14-19.)

Q.R.VI.110, 111. The President of a Court of Inquiry, Committee or

Board, is usually a combatant officer. Should the presence of a departmental officer be required who is of superior relative rank to the president, he should not be detailed as a member but would be directed to attend to furnish any information or evidence as a witness.

Proceedings of Courts of Inquiry, Committees and Boards, are written either on special printed forms or on a regular Army Form. (A. 2.) Q.R. VI.110

They are recorded in a form similar to that for C. M. They are signed by the President and each member; if any one of them differ from the others, he is entitled to record his opinion separately.

The proceedings of a Court of Inquiry are usually kept secret. They are "privileged" and recognized as such by civil courts.

The following are the regulations respecting Courts of Inquiry:—

The court may be composed of any number of officers, of any rank and of any branch or department of the service, the composition being regulated by the convening officer. In ordinary cases three officers are sufficient, the senior acting as President. R.P. 193. Q.R. VI.109.

The court must be guided by the written instructions of the convening officer. These instructions should be full and specific, and must state the general character of the information required from the court in their report.

A Court of Inquiry has no judicial power, and is in strictness not a court at all but an asssembly of persons directed by a C. O. to collect evidence with respect to a transaction into which he cannot conveniently himself make inquiry.

Previous notice should be given of the time and place of the meeting, and of all adjournments of the court, to all persons concerned in the inquiry.

Whenever any inquiry affects the character of an officer or soldier, full opportunity must be afforded to such officer or soldier of being present throughout the inquiry and of

making any statement he may wish to make and of cross-examining any witness whose evidence in his opinion affects his character; he is also to be allowed to produce any witnesses in defence of his character.

A Court of Inquiry has no power to compel witnesses to attend, and the evidence cannot be taken on oath.

Although civilian witnesses cannot be compelled to attend, military witnesses may, of course, be ordered to attend.

When the conduct of officers and soldiers is matter of inquiry, they cannot legally refuse to attend, if ordered, though they may decline to take any part whatever in the proceedings, that is, they may refuse to answer any questions, etc.

This rule evidently authorizes an accused person to refuse to produce any documents although the court may request him to do so.

A Court of Inquiry will give no opinion on the conduct of any officer or soldier, and its proceedings cannot be given in evidence against an officer or soldier. Nevertheless, in the event of an officer or soldier being tried by C. M. in respect of any matter which has been reported on by a court of inquiry, such officer or soldier is entitled to a copy of the proceedings of the Court of Inquiry.

The proceedings are sent by the President to the C. O. who assembled the court who will, *on his own responsibility*, form such opinion as he thinks just.

When, in consequence of the assembling of a court of inquiry, an opinion adverse to the character of any officer or soldier is formed by the officer who determines the case so inquired into, be he the C. O. or a superior officer to whom the case has been referred, such adverse opinion is to be communicated to the officer or soldier against whom it has been given.

The court may be re-assembled, as often as the convening officer may direct, for the purpose of examining additional witnesses or recording further information.

Members of a Court of Inquiry, in a case which is subsequently the subject of a C. M., are not to be detailed as members of the C. M.

COURTS OF REQUESTS.

Courts of Requests are only held in India at military stations beyond the jurisdiction of courts of small causes. A. A. 148-151. They may be assembled for adjudicating on actions for debt not exceeding £40, and all personal actions taken against officers (not soldiers) by civilians. These courts are composed entirely of commissioned officers, usually five, never less than three. Sections 148-151 of the Army Act lay down the composition, jurisdiction, powers, etc., of these courts.

CHAPTER XIV.

MARTIAL LAW.

It is difficult to clearly define Martial Law, or to state what offences may be tried by it, when it may be proclaimed, and how offenders are to be tried and convicted under it. On all these points guidance has to be sought by what has been done in the past.

Up to the close of the seventeenth century Martial Law had been from time to time exercised in Great Britain and Ireland by Commissions from the reigning Sovereign, but even then it was considered by Parliament an extreme use of prerogative.

In the early M. A. there was no mention of the Crown's prerogative to proclaim Martial Law, but in later M. A.'s and in the present Army Act, it distinctly states that no man can be "subjected in time of peace to any kind of punishment within this realm by Martial Law." Hence there is a distinctly defined permission to proclaim Martial Law.

But the difficulty remains to define when this authority may be exercised.

There have been many definitions of Martial Law, but all are defective. Sir David Dundas, as J. A. G. in 1850, said: "It is necessary to distinguish between Military Law and Martial Law. Military Law is to be found in the M. A. and A. W.—those and those alone it is which

are properly called the Military Code and by which the land forces of Her Majesty are regulated. Martial Law is not a written law; it arises on a necessity to be judged of by the Executive and ceases the instant it can be allowed to cease. Military law has to do only with the land forces mentioned in the Second Section of the M. A., Martial Law comprises all persons, whether civil or military."

Lord Hale describes Martial Law, as "no law, but something indulged rather than allowed as law." And Lord Brougham "the law of the soldier applied to the civilian." It is, in effect, a rule for superseding the ordinary law, which necessity, more or less urgent, must be shown to justify.

As Sir Charles Napier expressed it, "the union of legislative, judicial and executive power in one person is the essence of Martial Law," or as the Duke of Wellington explained, "It is neither more nor less than the will of the General of the Army."

Martial Law has also been defined as "sway exercised by a military commander over all persons, whether civil or military, within the precincts of his command, in places where there is either no civil judicature, or where such judicature has ceased to exist."

As a rule offences under Martial Law are tried by G. C. M. When necessary Field G. C. M. or S. C. M. might also have to be assembled when a G. C. M. cannot be convened.

Martial Law may be considered under three heads:—

1st. *As applicable to officers and soldiers under the Army Act, and under what circumstances it is to supersede the latter.*

2nd. *As applicable to Provinces occupied during the continuance of war.*

3rd. *As applicable to a whole community in time of Rebellion.*

I. It is admitted beyond a question that the *law of necessity* may arise and may be used against persons under

the Army Act. There is excellent authority for this namely, the opinions of eminent lawyers.

In the case of Governor Wall, who was a Lieut.-Colonel in the army and Governor and Commandant of an island on the West Coast of Africa in 1782, the garrison of which consisted of about 150 men :—

One day several men of the detachment went to the paymaster's house to demand an allowance to which they considered they had a right on account of the short issue of rations. The Governor interposed, ordered a parade, and had a sergeant, who was among those who went to the house, severely flogged with a one inch rope inflicting on him 800 lashes from the effects of which the man died five days after. The Governor left the island the day after this flogging and arrived in England, but went abroad again on the advice of his friends to be out of the way. Twenty years later he was brought to trial for murder and executed.

The line of defence set up was that a mutiny existed in the garrison and that this sergeant was one of the ring-leaders; and further, that officers on parade had formed a "drum-head" C. M. before the flogging and that he, the Governor, merely carried out their sentence. The statement as to the C. M. he failed to establish, but the judges ruled that had he done so the defence would have been valid.

The Attorney-General prosecuting, said : "There may be circumstances for a military officer justifying him in the infliction of punishment without a General or R.C.M., if there be that degree of imminent necessity that supersedes recourse to ordinary tribunals. It concerns the public safety that means of repressing a mutiny should be powerful, sudden, and capable of application in order to cope with such an evil. If the mutiny in the garrison did exist and was serious, as was stated in the defence, the prisoner would not only have been an innocent man, but a meritorious man for using the powers within his reach."

The Judge, charging the jury with these views, coincided in them and said: "If there were a mutiny, and if there were a C. M. such as could be had, even not a legal one, and if the man was warned that he was on his trial and called upon to say how he became one of the mutineers; and if you do not discover a malicious intent to destroy this man, or a wilful disregard of human life in the use of the instrument and the manner of the punishment, you will acquit the prisoner."

Again, Sir David Dundas, in giving evidence in 1850 before the Parliamentary Committee of Inquiry into the Ceylon disturbances of 1848, said: "If five or six regiments mutiny in the field, would any one tell me you must apply to Parliament before you could reduce these persons to subjection?—*there must be somewhere, for public safety, a right to exercise such power in time of need.*"

These opinions are often quoted and expressed without dissent, and never controverted.

Under this heading used to come the summary punishments for crimes committed by all offenders in the theatre of war inflicted by the Provost Marshal under the authority of the C. in C. This authority rested on the same basis, namely on Martial Law; it was an arbitrary act deriving its force from necessity and custom and was continued up to the close of the Peninsular War. It was formerly considered that the power of life and death must always be vested in a C. in C. of an army in the field, his justification for using this power and mode of exercising it being his own conscience.

In Holland, in 1794, the Duke of York exercised his power summarily on soldiers guilty of theft and attempted murder.

In 1809 the Duke of Wellington under his personal instructions ordered soldiers to be put to death immediately for disobedience of orders; and he wrote that he knew not how discipline was to be enforced unless the practice was continued. A year later two soldiers were hanged without a C. M. for plundering, and an order publishing

these sentences added that "every instance of the kind would be as immediately and as severely punished." The Duke, feeling the responsibility of his position, wrote frequently to the Ministers in England to have this authority legalized. As a result in 1813 the Legislature assisted the C. in C. by making provision for the speedy trial and punishment of soldiers committing offences against civilians or their property.

At this time the power of the C. in C. was exercised by Provosts Marshal who had authority to put offenders to death at once provided they were *actually found in the act* of disobeying any published order; offenders apprehended by them or by their Assistants not actually found in the commission of offences were punished by C. M.

In 1829 the authority of the C. in C. for governing an army in the field was strengthened by authorizing commanding officers to assemble C. M. on the line of march with power of immediate punishment, these were known as "drum-head" courts martial.

Now the C. in C., or Provost Marshal under him, has this power of severe summary punishment no longer; but the commander of a force in the field must assemble a Field G. C. M. or S. C. M. for the trial of an offender if no ordinary C. M. can be assembled, and these courts have full power to award capital punishment.

II. The application of Martial Law to an occupied or conquered Province.

From time immemorial a Conqueror has been entitled to impose on the conquered any law he may think proper. This condition commences from the very moment he conquers the country, as all former authority has ceased to exist, and the C. in C. is bound to establish a code of laws until his Sovereign lays down a regular code. As a rule the C. in C. reinstates the civil administration only taking care they do not interfere with his military operations.

The law is then whatever the military commander chooses to establish, the Duke of Wellington's definition

being applicable to this case. But, in dealing with his own soldiers, his power is limited by military law.

In the instructions issued by the Northern States Government, in April 1863, for the guidance of their armies during the civil war, military oppression is denounced and Martial Law is defined as being "simply military authority exercised in accordance with the laws and usages of war," or the "common law of war," it being incumbent upon those who administer it to be strictly guided by the principles of justice, honour, and humanity. It should be less stringent in places fully occupied and fairly conquered than in places still the scene of actual conflict. Its most complete sway is allowed in the commander's own country when face to face with the enemy, because his paramount duty is the defence of the country.

III. When may Martial Law be resorted to as affecting the whole community, civil and military, and how?

This case presents greater difficulties, and is not a problem to be solved in anticipation of the event.

All acts committed under the authority of Martial Law are always scrutinized, and must be justified subsequently by an Act of Indemnity passed to cover only such acts as have been properly done under the "law of necessity," but Parliament does not indemnify acts not of necessity but of oppression.

Martial Law under this head may be considered under two cases:—1st., when a country or district is formally put under martial law by an Act of Parliament, and 2nd., when under circumstances of imminent danger the Executive proclaims Martial Law.

(*a.*) When Parliament sanctions the introduction of Martial Law in a country C. M. can legally try any person, as in this case the same power which made the civil law suspends it and replaces it temporarily by the military code. But civilians tried by military courts would not be awarded punishments peculiar to the military code when tried for offences purely civil.

No authority but Parliament has really the power to proclaim Martial Law. The Executive is justified, however, under certain circumstances, in taking the law into its own hands in self-defence—the case is analogous to that of killing a man in self-defence.

The proclamation of Martial Law by any other authority than Parliament, being itself illegal, cannot legalize acts done under it; but in the administration of Martial Law, although forms and procedure will not legalize acts done they will materially diminish responsibility and, therefore, as close an adherence as possible to the established laws of the country, the established usages of war, and the forms and practice of C. M. is always advisable.

The question of the co-existence of Military Courts with Civil Courts has never been fairly settled. When Martial Law was instituted in Ireland, in 1798-99, 1803 and 1833, the Civil Courts sat for all ordinary cases.

In the Petition of Right it was acknowledged that Martial Law was a necessity where Common Law could not be enforced. The arguments in the House were:—If an enemy come into any parts where Common Law cannot work there Martial Law can be executed; but if a subject be taken in rebellion, and be not slain at the time of his rebellion, he is to be tried afterwards by the Common Law.

In 1799 the Irish Parliament declared that Martial Law should prevail whether the Civil Courts were open or not. The Courts in Dublin were open and a collision between the Civil and Military Courts took place, and the King's Bench granted a writ to take a rebel sentenced to death by a Court Martial out of military custody. The rebel was too ill to be removed and died subsequently, and hence the case was unfortunately never decided. However this shows that the supreme authority of the Civil Law was admitted.

Again, in the case of the proclamation of Martial Law in Canada in 1837, a letter of instructions from England to the Lieut.-General commanding stated:—"In all cases

where the unlimited authority you are now vested with can be exercised in co-operation with, or *in subordination* to the Civil Courts, you are required to so execute it." Hence the General was always when possible to send persons for trial before the civil authorities.

(*b.*) When Parliament is not sitting and cannot be assembled, the Proclamation of Martial Law in time of peace should, if possible, be made by the Crown or the representative of the Crown under the advice of the responsible ministers.

With reference to the power of the Executive in the Colonies to proclaim Martial Law Sir David Dundas, in evidence before the Ceylon Committee, stated :—"Whatever power the Crown can wield the representative of the Crown in a colony can also take upon himself to wield,"—and he can therefore proclaim Martial Law in theColonies.

Martial Law under this head is practically no law at all, it simply means the exercise of power at the discretion of those who resort to it. The Duke of Wellington stated: "It is for the authority proclaiming Martial Law distinctly to lay down the rules and regulations, and the limits according to which it is to be carried out."

The person who exercises Martial Law does so under responsibility to the laws of the country, and he may be subsequently called to account for his actions.

The question arises whether the *proclamation* of Martial Law before using the military to put down a rebellion is a legal necessity or not?

Opinions say not. The Law Officers of the Crown, in 1838, said that the proclamation confers no power on the Governor which he had not without it; the only purpose is to give notice to the inhabitants. A Governor can proceed to put down rebellion with or without proclamation, but the latter is advisable for the sake of warning well disposed inhabitants. But this refers to putting down a rebellion by using the military, not to the trial of civilians by C. M. under Martial Law.

It is lawful for the military power to put to death all persons engaged in the actual work of resistance; but this prerogative does not extend beyond the case of persons taken in open rebellion, for when the regular Civil Courts are open so that criminals might be handed over to them, there is not any right in the Crown to dispose of them otherwise.

In 1867 a circular despatch was sent to the Governors of Colonies with reference to Martial Law, its object being to call upon them to introduce Bills before the Local Houses of Assembly for repealing the various Acts on the subject then in force, and to give the Governors authority to proclaim Martial Law, it stated: "Her Majesty's Government does not prohibit resort to Martial Law under urgent circumstances and in anticipation of an Act of Indemnity, but the justification of such a step must rest in the pressure of the moment, and the local Governor cannot be relieved from the responsibility of deciding on the nature of the circumstances which would authorize him to withhold or proclaim Martial Law."

In every colony the Governor is the responsible person for keeping order, and he would generally consult and act with the the military Commanding Officer.

A distinction must of course be drawn between Crown colonies and Settlement colonies. The former are those which have been taken by force of arms (Gibraltar, Natal, Bermuda, etc.) and an absolute right exists to proclaim Martial Law at any time; in the latter, however, the settlers take with them all the rights of British citizens and cannot be deprived of them.

Controversies invariably follow the proclamation of Martial Law, not that the prerogative of the Crown to do so is questioned, but the disputed points generally are —its continuance after the necessity for it has ceased, and the exercise of excessive severity—hence strict caution is necessary to see that the general principles of justice are carried out.

The difficulties of the Jamaica case in 1865 appear to

have added confusion and danger rather than enlightenment.

In Jamaica at that time the Governor was authorized by Local Statute with the advice of "Council" to proclaim Martial Law in any disturbed district to last for 30 days, when it could be renewed in the same way.

On the 13th October 1865 Governor Eyre proclaimed Martial Law in the county of Surrey, except in the city and parish of Kingston.

Mr. Gordon, a ringleader and agitator, was arrested at Kingston on 20th October, *i. e.*, in a place out of the proclaimed district by order of the Governor and handed over to the C. O. of troops (Colonel Nelson) at Morant Bay, a place where Martial Law prevailed, with instructions to try him by C. M. on such charges as might seem advisable. He was tried next day for high treason and for complicity in acts committed on the 11th October, *i.e.*, before the date of proclamation, convicted and sentenced to death. The proceedings were confirmed by the Officer Commanding the troops in the district, and subsequently by the Officer Commanding the troops in the island (General Codrington) who approved and said that the state of affairs in the colony called for prompt and immediate action. Gordon was executed on the 23d October.

Subsequently an Act of Indemnity was passed by the Local Legislature for all officers who had rightly administered Martial Law in good faith. Nevertheless an indictment for murder against Governor Eyre was afterwards presented to a Grand Jury in London, which indictment rested on four counts:—

1. *Locality* of arrest not under Martial Law;

2. Crime committed *prior to date* of proclamation;

3. Only evidence was *documentary*, and insufficient before an ordinary court;

4. State of Martial Law prolonged beyond *necessary time*.

With regard to the first count, Judges differed. One stated that as by the general law all crime is local and

must be tried where committed, the Governor was justified in bringing Gordon into the proclaimed district for trial. Others however considered that, crime being local, an offender should only be arrested and tried within the area in which Martial Law is in force. Also, as concerns the second count, the balance of opinion was that no proclamation of Martial Law can have a retrospective effect.

Hence if part only of a country is under Martial Law an offender, to be subject to it, should be arrested and tried, and his offence should have been committed, within the district where Martial Law prevails. Further, for an offence to be punishable under Martial Law it must have been committed *after* the Proclamation was issued, and must be tried *before* the same is rescinded.

With regard to the third count, the C. M. consisted of a Lieutenant Royal Navy as President, with another Lieutenant Royal Navy and one Ensign West India Regiment as members, and no allegation as to the legality of the court was made. The objection of insufficiency of evidence was not much argued as it was considered that the court's opinion must be decisive. Mr. Disræli, in 1866, as Chancellor of the Exchequer, stated in reply to a question in Parliament, "In the state of Martial Law there can be no irregularity in the composition of the court, as the best court that can be got must be assembled."

As concerns the last count, it was considered that the Governor was under no obligation to rescind the proclamation. The Jamaica Statute limited the duration of Martial Law to 30 days; this was considered objectionable, and gave rise to the circular letter already referred to.

Governor Eyre was therefore considered to have acted wrongfully in arresting Gordon out of the proclaimed district and transferring him to the proclaimed district for trial; also that as he committed the crime before the proclamation of Martial Law Gordon should only have been

tried by Civil Law. It was however acknowledged that Governor Eyre had acted in good faith and had brought the colony safely through a great danger so that, notwithstanding these errors, protection was afforded him.

In April 1867 an indictment for murder against Colonel Nelson was also presented to a Grand Jury in London, but the Bill was thrown out after the charge by the Lord Chief Justice (Lord Colburn) who said that the arrest of Gordon at Kingston by Governor Eyre and removal to Morant Bay was illegal, but Colonel Nelson was not responsible for this and that it was not part of his duty to ascertain how Gordon was brought there, and that he did right to execute a rebel.

The law of necessity for the proclamation of Martial Law is then fully recognized, but all acts done under it have to be covered by an Act of Indemnity which covers from civil prosecution. This is always allowed for acts done reasonably and in good faith by the ruling authority for the repression of rebellion, and also for such acts as have been done by subordinates under and with the authority of superiors, and even for acts done in good faith by inferiors without orders.

In the United States a very proper distinction is drawn between Military Courts assembled under the Statute which are called "Courts Martial," and those assembled when Martial Law is in force which are called "Military Commissions." These Military Commissions administer no law but the "usage of war." In England both descriptions of Courts are called Courts Martial, and the general public are consequently not able to discriminate between the two.

CHAPTER XV.

EVIDENCE.

A.A.128

The rules which guide C. M. as to the admission and rejection of evidence must be the same as those which guide Civil Courts in England; and objections to any question to a witness or to the admission of any evidence may be made accordingly, and no person can be required to answer any question or produce any document which he could not be required to answer or to produce if before a Civil Court in England.

R.P.72.

A C. M. may not receive evidence for the prosecution which is not relevant to the facts stated in the statement of particulars in the charge, nor any evidence which is not admissible either according to the Civil Courts in England, or under the Army Act, or under any other Act of the U. K.

Evidence is the testimony upon which a fact is believed, and at a C. M. it includes all legal means, exclusive of mere argument or deduction, which tend to prove or disprove any matter of fact the truth of which is under investigation.

The principal means for obtaining evidence are :—

1. "Parole" or "oral" testimony of witnesses examined *vivâ voce* in court as to facts within their knowledge.

2. Written or documentary evidence produced in court.

3. Certain documents which courts are bound to notice judicially, *i.e.*, without proof. Such are:—Acts of Parliament, Queen's Regulations, Royal Warrants and Regulations, Official Army Lists, etc. Every one is supposed to know them, and the court may refer to them to refresh their memories without their being produced and sworn to, as all other books, papers etc., must be when adduced as evidence.

The value of oral evidence depends on the fact of a witness, speaking from his *own* knowledge and his trustworthiness is guaranteed in two ways:—1. by his being on oath,—2. by his being open to cross-examination.

This cross-examination is allowed for the purpose of proving his veracity, and also to test his powers of memory or observation.

The court may also inspect for themselves any things or places properly identified by evidence, and considered material to their decision. A.A.58.(7)

Proof is rather the effect and consequence of evidence, than the evidence itself. A matter is considered legally proved when it is established by *competent and satisfactory evidence.*

Competent Evidence is such as is admissible by law and which it requires as fit and appropriate testimony to the point in question.

Satisfactory Evidence is such as will satisfy an unprejudiced mind beyond reasonable doubt.

The proof of a fact may be either direct and positive, or circumstantial and presumptive. *Positive proof* arises from direct evidence which establishes or negatives the fact immediately in question, *i.e.*, the direct evidence of witnesses who speak from their own actual and personal knowledge. *Presumptive proof* arises from circumstantial evidence, that is, *direct* evidence of collateral facts, or evidence which *directly* proves some fact which is not itself in question but the proof of which indirectly proves or disproves the fact in question or is a reason for or against the probability of such other fact. The value of presump-

tive or circumstantial evidence depends upon the number and strength of the distinct links or circumstances by which it is connected with the main fact at issue and which concur to establish the facts, not on the *amount* of evidence proving one fact.

Where the proofs are distinct and independent of each other, the probability increases in proportion to the number of proofs, for the falsehood of one does not affect the others.

Presumptive evidence being a secondary kind of proof is only to be allowed when the fact cannot be proved directly. But this kind of evidence is more trustworthy than mere statement, for a concurrence of well established incidents may frequently carry clearer conviction to the mind than positive evidence unaccompanied by a narration of circumstances.

A question which would be irrelevant in the examination-in-chief may be quite allowable in cross-examination; and though, as a rule, inquiry into facts other than those which are charged would not be allowed yet, in the absence of direct proof, if it can be shown that they bear *indirectly* on the point at issue, such evidence may be taken.

In a charge for stealing, though it is not usually material to inquire into the taking of other goods not mentioned in the charge, yet if goods stolen the same night from the same or adjacent premises were found in the prisoner's possession it would be strong presumptive evidence that he had been in or near the owner's house at the time, and in that point of view it would be material.

In the same manner as collateral testimony can be brought against the prisoner to show intention, so can he bring similar evidence in his defence to disprove such intention; e.g., on a charge of murder he may prove acts of kindness and expressions of good will towards the deceased to show that his intention was not likely to be what the charge imputed.

Having regard to the individual rights and privileges of British subjects and also to their liabilities, it is

of the utmost importance for persons who have to administer justice to know :—

1st. What facts may and what may not be proved in different cases under trial.

2d. What sort of evidence must be given to establish a fact it is desired to prove.

3d. By whom and in what manner evidence must be produced by which any fact is to be proved.

If inadmissible evidence be not rejected, not only may injustice be done but the proceedings may be very much protracted.

Eminent writers on Military Law agree that a C. M. should adhere to these "rules of evidence" strictly and, as far as possible, avoid minute points and subtle variations not essential. Ordinary cases tried by C. M. are so simple that the rules of evidence scarcely come into use, yet in more important cases which attract public attention, any departure from these rules would cast discredit upon Military Courts. Often the question of admissibility of evidence forms an important part of the trial, especially in cases of embezzlement.

An eminent lawyer, stating that the laws of evidence should be regarded at C. M., said :—"I cannot understand how justice can be done by persons who do not understand what tends to prove guilt or establish innocence."

It is the duty of the J. A. to advise the court as to the admission or rejection of evidence, and as in the colonies he would generally be a staff officer, and as all officers of a court are individually responsible for the legality of the proceedings, it is important for all officers to know the principles on which evidence should be admitted or rejected, especially as more C. M. are quashed on grounds of want of knowledge on the question of evidence than on any other.

There are five general rules of evidence which are the result of the accumulated experience of the ablest lawyers as to the best and most direct way of arriving at the

truth. There are also some Statutes which lay down what shall be evidence in certain cases,—these chiefly refer to documentary evidence and not to oral.

In applying these rules, evidence is doubtless occasionally excluded which might be of great importance to both sides; yet no system is perfect, and these rules are acknowledged to be most effective in arriving directly at the truth and of protecting the court from lengthened trials and the accused from false conclusions.

The General Rules of Evidence which should be thoroughly known and understood are:—

1. The evidence on either side must be *confined to the points at issue.*

2. The point at issue must be *proved by the party who asserts the affirmative.*

3. It is sufficient to prove the *substance* only of the issue or charge.

4. *Hearsay* is not evidence.

5. The *best evidence* must be produced which the nature of the case will admit of.

RULE I.—THE EVIDENCE ON EITHER SIDE MUST BE CONFINED TO THE POINTS AT ISSUE.

Points at issue are the facts alleged to be true by the prosecutor and denied by the prisoner in his plea of "not guilty." They are also all the facts from the establishment of which the existence, non-existence, or the nature of any right, liability or disability asserted or denied would by law follow.

All evidence which does not go to prove the points in issue should be rejected. Nevertheless evidence which is at first apparently irrelevant may really bear on the issue importantly, therefore careful discretion should be exercised and evidence may be refused unless it can be shown in what way it bears on the case.

In fact a C. M. cannot insist too strongly upon rejecting all evidence which is foreign to the charge, but cir-

cumstances which may not have any immediate and direct bearing upon the very point at issue may, nevertheless, afford an indirect and consequential inference to prove or disprove the disputed fact and, therefore, evidence to prove them should not be disallowed provided the party who urges them shall satisfy the court as to their relevancy. For instance, in a case of desertion the purchasing of plain clothes or selling of uniform by the prisoner would afford grounds for the inference that he had no intention of returning, such intention being one of the points at issue, and therefore evidence to prove such fact would be admissible.

It is then acknowledged that evidence may be given of acts so closely in connection with the matter in issue as to form one chain of facts, and that their exclusion would make the rest of the evidence at least obscure. Hence such come under the rule of confinement to the point in issue.

This first Rule includes:—

(*a.*) Evidence in Res-gestæ or collateral matter, and

(*b.*) Evidence of character.

EVIDENCE IN RES-GESTÆ.

Res-gestæ has been defined as:—"Matter so connected with the subject of the trial as to explain its object, illustrate its character, and form with it one continuous transaction though not in itself proof of the main fact." Hence *res-gestæ* are all those acts and transactions which form part of the matter under investigation.

It is admitted that facts, by whomsoever done, if relevant to the matter at issue, may be given in evidence as part of the *res-gestæ*; and that facts relevant to the issue are facts from the existence of which inferences as to the existence of the facts at issue may be drawn,—such as, motive, admission, subsequent conduct, etc.

For instance, the prisoner's conduct after the crime may tend to show whether he committed the crime or not, and evidence as to his conduct should therefore be received.

Where several aid and abet in the commission of any crime the act of one is deemed to be the act of all.

In case of *Conspiracy*, the connection of each individual with the conspiracy must first be proved and then the acts, writings or words of each member are, in the eyes of the law, the acts, etc., of the whole confederacy; and hence all evidence on such acts are admitted as against any member.

A conspiracy must have for its object an illegal act, or the effecting of some legal end by illegal means.

It is not necessary to commence by proving the conspiracy and then bringing evidence of facts performed to show the conspiracy has been carried out. A conspiracy may be said to prove itself. If persons are found working together, apparently in a concerted or associated manner, and the natural and apparent intention of their action is to produce certain results, an indictment may be sustained charging a conspiracy to produce these results.

For this, evidence as to the history and nature of the conspiracy, even before the prisoner had anything to do with it, is admissible.

Writings and words being part of the *res-gestæ* are evidence against co-conspirators, but statements and writings of conspirators not being part of the res-gestæ but mere relations or narratives of some part of the transaction are treated as hearsay and are not admissible.

It is now held to be no objection in itself that evidence discloses other offences; evidence cannot be refused on such grounds. This rule, however, does not include evidence to show that a prisoner charged with a particular crime had a general tendency to commit that particular kind of crime, or that he had committed other offences of the same kind quite unconnected with the crime in question.

Thus on a charge of murder, former acts or conduct towards deceased showing goodwill or malice would be relevant, but conduct towards other persons would not be relevant.

On this head it often happens that evidence, otherwise inadmissible, serves to identify the prisoner with the crime—as his having been in a certain place at a certain time and of having an opportunity of committing the crime.

Also, in a case of arson, evidence that property then taken out of the house while on fire was found in the prisoner's possession is admissible.

Again on a charge of desertion, it may be admissible to inquire into the fact of a highway robbery committed by the accused but not into the facts attending the robbery, as the former only would tend to show the prisoner's intention to desert.

It lies at the discretion of the court whether to accept or refuse such evidence.

Clode, in his Chapter on Evidence, says:—"A collateral inquiry into other facts and circumstances should only be received when they bear upon the charge and constitute presumptive proof."

The court would act wisely in receiving rather than rejecting doubtful evidence *if tendered by the prisoner*.

EVIDENCE OF CHARACTER.

No evidence of *bad* character can be given as an argument for a prisoner's guilt. As on a trial for murder, evidence as to attempts to murder other men would be excluded but threats against or previous attempts to assassinate the deceased would be admissible as evidence of *intention*, as would also any evidence showing the existence of a motive likely to instigate him to commit the murder in question.

Although evidence of bad character cannot be brought forward before the finding, yet evidence of good character may be brought forward in the defence. If the charge be proved evidence of good character cannot avail to disprove it, but where doubt exists as to guilt it may tend to strengthen a presumption of innocence.

Thus, where there is point blank contradiction of evidence as to facts and the prosecution is weak, evidence

as to character becomes very important, especially where there is only one evidence on each side—such as a fight between two persons without eye-witnesses.

All evidence as to character ought manifestly to have some connection with the charge otherwise it must not be allowed to weigh as evidence. For instance, it is no use to give a person charged with murder a character for honesty, or evidence of gallant conduct in the field on a charge of theft. A C. M. should receive such evidence, but it would not be weighed.

In addition to the evidence produced after the finding, a prisoner may produce evidence as to character during the trial, and such is received as part of his defence. The prosecutor may cross-examine such witnesses, but he may not bring other witnesses to rebut their statements till after the finding as the prosecutor can bring no evidence against the prisoner's character till after the finding; but then both parties may produce witnesses as to character and cross-examine them.

Sometimes prisoners lay before the court testimonials, letters as to character, etc. Such documents are not legal evidence, as such evidence must be *vivâ voce* and made by witnesses who can speak from their own knowledge regarding the prisoner; such documents should not therefore influence the court in their finding.

In C. M. it is however usual not to accept such documents as evidence but as an indulgence to the prisoner, and to append them, *not* to the proceedings, but to a separate letter forwarded to the confirming officer for him to take them into consideration and if he thinks fit to mitigate the punishment.

RULE II.—THE POINT AT ISSUE MUST BE PROVED BY THE PARTY WHO ASSERTS THE AFFIRMATIVE.

Thus if the charge be for drunkenness, it is for the prosecutor to prove that the prisoner was drunk, not for the prisoner to prove that he was sober.

If the prisoner plead "guilty" the prosecutor is reliev-

ed from the burden of proof as the charge cannot break down for want of evidence.

During the trial the burden of proving the charge usually rests on the prosecutor who asserts that the prisoner has committed such and such a crime, and he must prove the commission of that crime, *i. e.*, he "asserts the affirmative." The burden of proof, or "*onus probandi*," is in many cases, however, shifted to the prisoner in consequence of the "presumptions of the law," and the "presumptions arising from the evidence."

For instance, proof of the possession of stolen goods throws the onus of accounting for the possession of them on the prisoner. In case of desertion it is sufficient for the prosecutor to prove absence without leave for a considerable time, it is then for the prisoner to prove his intention to return; and so in like cases the burden of proof rests with him who has to support his case by the proof of a fact in every instance where it must be supposed to be within his knowledge.

PRESUMPTIONS.

Stephens defines a "Presumption" as that "courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved."

There are two classes of Presumptions:—

I. *Presumptions of the law.*

II. *Presumptions drawn from the evidence.*

PRESUMPTIONS OF THE LAW.

The Presumptions of the law with reference to criminal matters are simple and easily defined, and they hold good until the contrary is proved; as for instance it presumes:

1. That every man is innocent until the contrary is proved; except as in (3), if an illegal act be proved the law presumes illegal intention.

2. That every man is acquainted with the state of the law.

3. That every man must contemplate and intend the

necessary and natural consequence of his own unlawful actions.

When an action is done which is injurious to another man, the law will presume malice,—as the law presumes malice or intent to kill when a man has been killed by another. The indictment for murder always runs "with malice aforethought," but it is unnecessary to prove the malice. If the man was killed accidentally or in self-defence it is for the prisoner to prove that it was so because killing a man is an unlawful act, therefore the law presumes criminal intent unless proof be brought to the contrary. But in the case of *Forgery*, the criminal intent must be proved by the prosecutor because the act of writing another man's name is not a crime unless it be done with criminal intent.

So on a charge for "wilfully maiming *with intent* to render.....unfit for service." In default of other evidence the intent would be presumed from the illegal act of maiming, provided it be proved the maiming was *wilful*, if this is not clearly proved, then the act is not necessarily criminal and the *intent* would have to be proved.

There are other presumptions of the law which are specially defined by Statute. For instance, in cases of larceny, if a man is found by night with weapons used for housebreaking with intent to commit a felony, the law presumes he is there with such intent and the onus of proving he had a proper right to these weapons lies on the prisoner.

Setting fire to a mill:—the judges ruled that it might be assumed that there was intent to murder the occupiers.

Lord Mansfield points this presumption out very clearly when he says :—

"Where an act *in itself indifferent (i.e.*, not criminal), if done with a particular intent becomes criminal, *then* the intent must be proved and found ; but where the act is in itself unlawful, the proof of justification or excuse

lies on the defendant, and in failure thereof the law implies a criminal intent."

This principle holds good if the act be done by a man when voluntarily drunk and therefore without premeditation.

A letter when used against the writer, and generally any document, is presumed to have been written on the day of its date until the contrary has been proved.

A letter properly addressed to a person and posted. The law presumes that he received it unless he prove that he did *not*.

The law presumes that all necessary things have been done unless disproved; as on the trial of a soldier, his enlistment need not be proved, or when a soldier is tried for striking an officer the latter's commission need not be proved.

It is the duty of officers to make themselves acquainted with all orders published in the order book. A court therefore presumes that all such orders are known to the officer unless he can bring proof that he has *not been able to see it*.

Persons absent for seven years are presumed to be dead, hence bigamy cannot be found after seven years, etc.

Insanity.—Every man is assumed to be sane until the contrary is proved.

To establish the defence on the ground of insanity it must be proved that the accused at the time of committing the act was labouring under such a defect of reason that he did not know the nature and the quality of the act or, if he did this, that he did not know it was wrong.

The evidence of insanity must be confined to the *act in question*, not to the general state of the accused.

A temporary delusion may have the effect of acquittal, as it has been ruled that "if a man kills another whom he fancies to be taking his life, he must be acquitted. If he killed him in revenge for destroying his character or fortune he is punishable."

PRESUMPTIONS DRAWN FROM THE EVIDENCE.

Definition by Chief Justice Abbott:—"The presumption of any fact is an *inference* of that fact from other facts that are known; it is an act of reasoning."

Archbold:—"Natural conclusions from other facts proved, so as readily to gain assent."

The necessity for admitting such evidence, known as "circumstantial evidence," in criminal cases is owing to the difficulty of gaining direct and positive evidence.

In civil law a receipt for subsequent rent is presumptive proof that rent for the same premises for a previous period has been paid; so also proof of the settlement of a soldier's accounts for a particular month would, in the absence of proof to the contrary, be presumptive proof that he had been settled with for any former month.

Such presumptions, standing in the place of actual proof, have several degrees of weight.

Archbold divides presumptions into three classes:—Violent, probable and light.

1. Violent presumption.—When the presumption of one fact necessarily follows from another fact proved. As a man found near a house with goods stolen out of it.

2. Probable presumption.—When the facts proved are *usually attended* by the facts presumed. As a man found with stolen goods in his possession but not in the vicinity of the place where stolen, as at his lodgings,—it would be a probable presumption that he is *a* thief, but a violent presumption that he is either *the* thief or the receiver with guilty knowledge, and a prisoner with such a presumption against him has to prove it false.

3. Light presumption.—When the facts proved are not necessarily attended by the facts presumed.

Russell, however, says that "this division seems altogether useless, and the distinction to amount to nothing more than that in one case the presumptive evidence may be very strong, in another less so, and in another very weak."

In cases of theft it must be first proved that the articles have been stolen and then identified, but this is not always possible; as when articles such as sacks of corn have been stolen out of a barn or ship, then, if the articles in possession of the prisoner are found to be of the same kind as those remaining, the identification is presumed to be complete, and this is a violent presumption. Also, presumption of guilt depends considerably on the length of time stolen goods have been in possession, for *recent* possession may be taken to imply a presumption of guilt.

But the length of time must of course vary with the nature of the article and whether it is easily circulated from hand to hand or not, so that no rule can be laid down. A person was once charged with having certain household property in his possession sixteen months after they were stolen; he was absolved altogether. In the case of a horse which had been stolen six months, the then owner was free from presumption as the horse in that time might have changed hands.

It has been ruled that if the prisoner gives a reasonable account of how he obtained the property, as by giving the name of the person (a real person) from whom he got it, the burden of proof that that statement is false lies on the prosecutor, but if the statement is manifestly improbable then the "onus probandi" rests on the prisoner.

The Statute makes some departure from the usual rule to afford facilities for obtaining convictions against receivers of stolen goods. It is not necessary in cases of receiving stolen goods that the principal felon should be in custody or even amenable to justice. If the primary offence of obtaining the goods is a felony the reception of them is also a felony, so if the first is a misdemeanor the second is also a misdemeanor.

Evidence may be given that there was found in the possession of the person accused of receiving stolen goods other property which had been stolen within twelve months; such a fact would be received as evidence that

the accused is in the habit of receiving stolen property, knowing it to have been stolen. So also if such person within the five years preceding the trial has been convicted of fraud, such fact may be given in evidence.

In ordinary cases the Jury must have evidence of the proof of guilty knowledge,—this would be generally inferred from the facts of the case, such as that the goods were bought or sold much below their proper value, or that the goods were concealed and put separately from other goods, or that the accused has disposed of or pledged other stolen goods not mentioned in the charge. In these cases the intention of the receiver is not at all material, *i. e.*, whether he intended to assist the thief, or act for his own profit. These cases often occur when a
A.A.188. soldier sells his arms, necessaries, etc., to a civilian. The latter has then to show justification for having purchased such goods,—that he did not know the character of the person with whom he was dealing (a soldier), nor the character of the goods offered (public property), the inference being that he acted knowingly.

RULE III.—IT IS SUFFICIENT TO PROVE THE SUBSTANCE ONLY OF THE ISSUE OR CHARGE.

This rule is often applied when the evidence adduced fails to establish the full import of the charge but nevertheless proves facts which are sufficient to constitute a crime included in the charge, and which is therefore punishable according to the nature and degree of the offence.

In other words, where there is a variance between the evidence and the charge, so long as the *essence* of the issue is proved an offence of the same kind but of less degree may be found. All offences may be divided into: 1. the specific act, and 2. the particulars in aggravation; if the latter be not proved the accused may still be found guilty of the specific act.

A prisoner charged with desertion may be convicted of absence without leave, for absence is the substance of the

charge, the motive and design being matter of aggravation. A person charged with murder may be found guilty of manslaughter—the killing being the *essence* of the offence, malice only the aggravation of the fact. A prisoner, charged with offering violence to his superior officer in the execution of his office, may be convicted merely of offering violence, for offering violence is the essence of the charge, the rank of the person and the fact of his being in the execution of his office being circumstances in aggravation, and it may be shown that the prisoner did not know the rank and position of the person assailed.

It has been ruled in Civil Law that "if the evidence fail to prove the completion of an offence charged, the verdict may acquit of the offence itself, but convict of an *attempt* to commit such an offence provided the attempt is itself against the law. On such conviction he may be punished as if he had been charged originally with the attempt." Thus a person charged with a felony may be convicted of attempting to commit the felony and dealt with accordingly.

Many cases arise at C. M. where this rule is applied :—

1. Errors in names, dates, places, not essential to the charge.

A prisoner charged with desertion on a certain date may be found guilty of desertion, if the evidence shows he deserted, but on another date than that specified in the charge; but the exception must be stated in the finding, and he may forfeit service, etc., from date of his actual desertion.

2. In case of desertion the prisoner may be found guilty of attempting to desert, or of absence without leave, etc.

3. In case of insubordinate language, the *substance* only of the words used need be stated in the charge.

So also in the case of officers charged with "scandalous conduct" or soldiers with "disgraceful conduct," the imputation may be thrown out, still, if the crime charged constitutes an offence, conviction is legal and punishment may be awarded according to the degree of the offence.

When it is found that the names of persons or things, or ownership of property as stated in the indictment do not agree with the evidence, a Judge in a Civil Court may amend the indictment provided such amendments are not material to the defence, and will not injure the prisoner, but a C. M. cannot alter a charge which has been approved by the convening officer, but in the finding a "special finding" is given which specifies the amendment. The result is the same in the two cases, but the mode of proceeding is different, the object being that mere technical errors shall not allow of the prisoner's escape.

A prisoner cannot be found guilty of a crime of greater degree than that charged (except embezzlement for theft, A. A. 56), or of an offence of a different nature; but if arraigned for a lesser offence and found guilty of a greater degree of the same kind of offence, he may be convicted of the lesser offence. As a man tried for absence without leave may be found guilty of desertion, and convicted and punished for absence without leave.

In an indictment for larceny the evidence must agree with the charge in the species of articles stolen, but not necessarily in the number or value of the articles. Money or bank notes are simply charged as money, it not being necessary to describe the coins, whether gold, silver, etc. A form of words spoken in order to meet unimportant variance is laid down in regulations, and is found to be very efficient. When certain words spoken constitute a crime they are followed by "or words to that effect."

RULE IV. -HEARSAY IS NOT EVIDENCE.

Hearsay evidence is the evidence of statements made by third persons not in the presence of the prisoner.

That hearsay is not evidence arises from the admitted principle of English Law that every fact against a prisoner should be *proved on oath* and in his presence in order that he may have an opportunity of *cross-questioning the witness* as to his means of knowledge, his accuracy of observation, the strength of his recollection, and his disposition to

speak the truth. Hearsay evidence is therefore rejected for these two reasons, namely, that what the person said was not upon oath, and that the prisoner had no opportunity of cross-questioning the individual.

The term "hearsay," in its legal sense, is used with reference both to that which is written and to that which is spoken, *i. e.*, it applies to "documentary" as well as to "parole" evidence, being applied to that kind of evidence which does not derive its effect solely from the credit to be attached to the witness himself, but depends also in part on the veracity and competency of some other person *not* present from whom the witness may have received his information.

But it does not always follow that the words or writings of a third person not upon oath are "hearsay" and therefore excluded, for it often happens that the question is whether such things "were spoken or written," and not that "they are true." Thus, if it is necessary to know whether a person has acted in good faith, the information on which he acted, whether true or false, is "original" and material evidence.

What a man has said or written may prove that he had certain knowledge. Also words and writings of third persons are admitted in evidence if the sayings and doings of other persons than the prisoner form part of the charge.

The conversation of a prisoner connected with the subject of inquiry may be received as showing the inclination of his mind. Expressions sometimes afford the only evidence by which to judge of intention or design; thus, in cases where men have maimed themselves with a view to discharge, such evidence must of necessity be admitted.

There are then some exceptions to the rule that "hearsay is not evidence," and that every fact must be proved on oath in the presence of the accused, and that the witness must be liable to cross-examination. The following are the principal ones:—

1. The dying declaration of a man who has received a

mortal injury and believes himself to be dying, even though not made in the presence of the accused nor subject to cross-examination, is admissible in evidence but only where the death is the subject of the charge and the circumstances of the death the subject of the dying declaration. Such evidence is not available to prove anything else, such as robbery;—if a dying man be robbed, his dying declaration is not admissible to prove the robbery.

This forms an exception because the immediate prospect of death is considered equivalent to an oath in influencing the person to speak the truth.

The value of any dying declaration may of course be called in question and it may be shown that the deceased did not believe himself to be really dying at the time he made the statement; or that his statement, even if on oath, would be unworthy of belief.

2. Statements of a person robbed, or of a woman ravished, as to the fact, made immediately afterwards, may be received as confirmatory evidence, but no names or details of what was said at the time are received.

3. Evidence may always be given of what a third person has said *in the prisoner's presence* immediately after the commission of the offence, because his behaviour at the time is evidence for or against himself. For instance, supposing a witness deposes that he heard a noise in a neighbouring room, ran in, and saw the defendant lying on the floor with marks of violence upon him and the prisoner standing over him,—when the defendant cried out "Help,—that man is trying to take my life." This evidence would be admissible as confirmatory of any statement subsequently made by the defendant *because it was made in the presence of the prisoner;*—otherwise, this witness could not depose to what the defendant said.

4. Words or writings of third parties are often admissible in evidence, not in proof of circumstances related in such words or writings but merely in proof of such words or writings having been spoken or written, as being in fact

part of the transactions in question or of the *res-gestæ*; that is facts concerning which inquiry may be instituted as to whether they have taken place or not.

For instance in case of a conspiracy, an informer is allowed to state what passed at the meetings of the conspirators to show that they were treasonable; but if he were to go on and repeat a narrative there told by a third party, it would not be allowed to be taken as evidence against the prisoner.

Again a soldier is charged with coming to the knowledge of an intended mutiny and not giving information. To prove this the existence of a conspiracy to mutiny must first be proved whether the prisoner was there or not. To do this evidence must be taken of what others have done or said. But the particulars of such sayings and doings must only be given *when said or done in the hearing of the prisoner*, otherwise only the general purport of such sayings sufficient to show that a conspiracy existed.

It is often necessary to prove that a certain order was given, or that a person was acquainted with certain facts at a certain time. What has been said or written would, under such circumstances, be important evidence and not classed under second-hand evidence.

5. The evidence of a deceased witness examined on oath on a former trial between the same parties is also admissible and may be proved by a person who heard it, or by notes taken at the time.

6. Any witness may be contradicted or refuted by showing that previously he had made statements contrary to his present one, in such a case hearsay may have to be gone into.

The law will also receive the following hearsay evidence:—

Statements in ancient documents, and also statements of deceased persons as to pedigree.

Evidence as to reputation of being a good authority in technical matters (as doctor, engineer, etc.)

Evidence of deceased persons when speaking against their own interests.

Statements found in the deceased's writings, as entries in books, etc., when carrying on their professional duties.

Statements having reference to the health and sufferings of a person, as in the case of murder.

RULE V.—THE BEST EVIDENCE MUST BE PRODUCED WHICH THE NATURE OF THE CASE WILL ADMIT OF.

The meaning of this rule is that no evidence is to be admitted if there are grounds for supposing that better evidence remains behind within the power of the party producing the tendered evidence ; it relates chiefly to the admission of documentary evidence.

Secondary evidence is only admissible when the best and most direct cannot be had.

Secondary evidence does not mean "hearsay," for the evidence produced must be legal evidence ; for if the best evidence obtainable be "hearsay" it would be inadmissible. The best legal evidence not being obtainable, and upon proof being given to the court that the best is not attainable, then, and then only, is the next best legal evidence admitted; for the production of secondary evidence when better evidence is obtainable, would tend to raise a presumption of some secret or sinister motive for withholding the better and more satisfactory evidence, and would lead to the inference that the best evidence, if produced, would have led to the detection of some concealed falsehood.

Secondary evidence will not be received until it has been clearly shown to the satisfaction of the court that better cannot be obtained.

Now the question arises,—what is "the best evidence"?

The best evidence is doubtless the oral evidence of persons who can speak *from their own knowledge* of what they have seen or heard, or from having taken part in any transaction.

But evidence given by word of mouth is not necessarily the best evidence always, for it sometimes happens, as in the case of disobedience of written orders, that the document itself is the best evidence of its own contents.

Although the law lays down the kind of evidence to be produced, it does not restrict the amount. One witness is considered sufficient if his evidence be legally good and satify the court, except in cases of treason and perjury.

A distinction must be made between the "best possible evidence" and "mere repetition of evidence," for the point is not by how many witnesses a fact is proved but whether it has been *satisfactorily* proved so as to convince the understanding.

The value of evidence and what constitutes sufficient evidence is a matter which cannot of course be defined by law.

The following descriptions of evidence have now to be considered :—

1. *Documentary evidence.*
2. *Confessions and Admissions by prisoners.*
3. *Depositions before proper authorities.*
4. *Dying Declarations.*
5. *Evidence of Experts.*

I.—DOCUMENTARY EVIDENCE.

Documents are of two kinds :—(*a.*) *Pubic.* (*b.*) *Private.*

(*a.*) Public documents are all public records, registers, returns, paylists, C. M. proceedings, and similar documents.

(*b.*) Private documents are all letters whether official or private, private accounts, receipts, etc.

The most important application of the fifth Rule of Evidence is to the contents of written documents.

The broad rule is "contents of documents must be proved by the production of the documents themselves." No portion of any document is sufficient, the whole must be produced except in certain cases.

A copy is not allowed unless the original is not forthcoming, and then it must be proved to be a true copy, and must be duly sworn to by the person who made it or who compared it with the original, or if the original is not forthcoming the evidence of the person who wrote the original or of some one who has seen the document and can swear to its contents may be taken, but no unauthenticated copies or hearsay as to its can be received.

Whenever any person has in his possession or control any papers, returns, letters, books, or other documents which it is considered necessary to have at the trial, a special clause is inserted in the summons ordering him to attend directing him to bring them with him. This course is necessary as a personal or informal request is not binding.

The court has to decide whether the witness should be compelled to produce the documents asked for or not; if it decides he should do so and he refuse, he can, if a civilian, be attached before a civil court, and if a military witness, he can be put in arrest and tried by C. M.

Thus the prisoner may require the prosecutor to produce certain documents, but the prisoner cannot be compelled to furnish such evidence against himself but, if called upon to do so by the prosecutor through the court and he refuse to produce the documents, after proof of reasonable notice secondary evidence of their contents may be received.

Although originals are required to be laid before the conrt whenever practicable, copies or extracts may be attached to the proceedings.

The following are certain cases not provided by Statute in which secondary evidence of documents may be produced:

1. When the original document is lost or destroyed, secondary evidence is admissible, but it must be shown that the document was lost or destroyed, or that diligent search has been made for it in the proper place. When documents have been thought to be useless and therefore destroyed very slight evidence that they have

been so destroyed is accepted, and secondary evidence then admitted.

2. When it is in the hands of the opposite party who refuses to produce it. It must be proved to be in his hands and that he has been served with a summons to produce it.

3. When it is physicially impossible or highly inconvenient as to make it almost impossible to produce it, or in a country from which it cannot be removed.

4. When it is in the hands of a person privileged to withhold it, who insists on his privilege.

5. Documents of a public nature.

6. Documents for the proof of which special provision is made by law.

7. Where documents are numerous and not easily examined in court, and the fact to be proved is the general result of the whole collection, if that result is capable of being ascertained by calculation.

The following are certain privileged communications which are exempt from production:—

1. Communications made between husband and wife during marriage, and which do not cease on death or divorce.

2. Professional Communications, written or oral, made by clients to their legal advisers, barristers, solicitors, or attorneys professionally employed. The privelege does not extend to any other class of persons whatever, as clergymen in confession, medical men, clerks, or confidential friends, but it does extend to the clerks of legal advisers or interpreters employed by them at the trial.

3. *State Secrets*, or matters the disclosure of which would be prejudicial to the public. Thus minutes of evidence before the Privy Council, or evidence given before a Grand Jury, are privileged.

A person employed by Government cannot be compelled to disclose his instructions nor the names of spies, etc.; nor can a witness for the Crown be made to disclose

through what channel information reached government; thus in Crown prosecutions the names of persons giving information need not be disclosed—as a detective, not to divulge his informant, states:—"From information received—" This is a very important privilege.

4. Official communications between the heads of departments and subordinate officers are privileged.

The proceedings of a military Court of Inquiry cannot be called for in civil courts without the permission of the Crown; nor can the minutes of a court of inquiry be called for by C. M. without the consent of the superior military authority by whom the court of inquiry was assembled. So also confidential reports or confidential letters can be produced only by permission of superior military authority. Should it be refused, the refusal ought to be properly proved and recorded in the proceedings.

Exceptions by Statute to the rule that the best evidence must be produced:—

Public documents may be proved by secondary evidence, *i. e.*, copies are allowed.

Public documents are held to be the acts of *public functionaries* in the execution of their business.

All public books and documents, such as registers, kept under the authority of particular Statutes are admitted as evidence, but of such facts only as are required to be entered therein and as are immediately within the personal knowledge of the Official making the entry. For instance, the Prison Register is admissible to prove the dates of commitment and discharge of prisoners, but not to prove the cause of commitment because the crime was not within the knowledge of the prison officer.

Whenever any official book or other document is of such a public nature as to be admissible in evidence, any copy or extract is admissible provided it be authenticated by the signature of the officer to whose custody the original is entrusted.

But all other documents which do not come within the

above category, and all letters of whatever description, whether official or not, must be proved by primary evidence, *i. e.*, by the production of the documents themselves.

For instance, a copy of a register is proof of a marriage, baptism, or funeral, but a letter from the clergyman stating that he performed such a ceremony is no proof. Such a letter is merely the written statement of a person *not* before the court, not on oath, and not subject to cross-examination.

Private writings, including what are known as official letters, are in no case evidence of the facts stated therein, but they are the best evidence of the fact of their having been written (not the truth of their contents) and are therefore admitted when in the nature of *res-gestæ* or as proof of intention. When they form part of the subject matter of a charge, as when the charge is for writing a disrespectful letter, for disobeying a written order, etc., these documents afford stronger proof than any parole evidence.

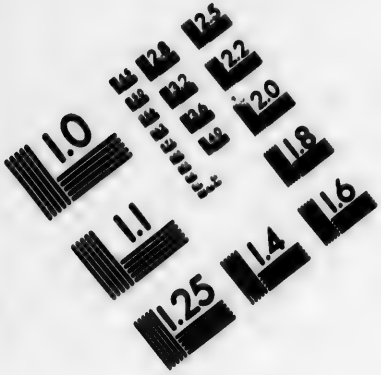
An insubordinate letter is proof of insubordination, and a threatening letter is proof of the threat.

The following are the principal cases when documentary and secondary evidence are admissible at C. M. and are evidence of the facts stated in them:— A.A.183.

(*a*.) The attestation paper purporting to be signed by a recruit, or a declaration on re-engagement, to prove the several particulars represented therein.

(*b*) Letter or other document respecting a person having served, or not having served in, or having been discharged from, H. M. forces or ships, if signed by or for a S. of S., or Commissioner of the Admiralty, or by the C. O. of the force or ship to which such person appears to, or claims to have belonged.

Thus the descriptive return of a deserter sent by a Justice of the Peace to the S. of S. for War is legal evidence of facts stated, and S. of S.'s letter to C. O. in reply.



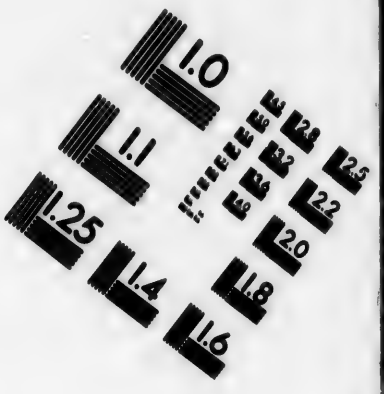
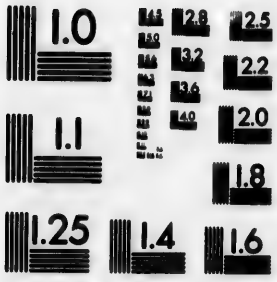
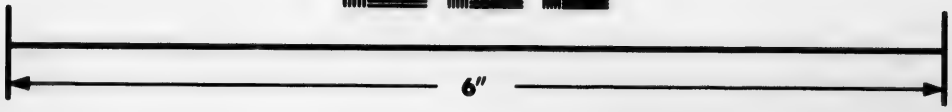
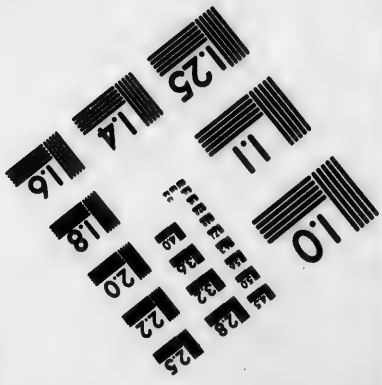


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A letter from any C. O., or Commander of a ship from which any person shall appear to have been discharged, is evidence of the facts stated therein.

(*c*) Copies, purporting to be printed by a government printer, of Queen's Regulations, Royal Warrants, Army Circulars, and any rules made by H. M. or S. of. S. in pursuance of the Army Act.

(*d*) An official Army List, or Gazette, are evidence of the status and rank of officers, also of their appointments and corps.

(*e*) Any official warrants or orders made by any military authority.

(*f.*) Delivery at the registered place of abode of a man in the army reserve of a notice issued by proper authority is evidence that such notice was brought to the man's knowledge.

(*g*) Record made in regimental books in pursuance of the A. A. or Q. R., and signed by the C. O. This would embrace:—

A.A.71. 1. Record of Court of Inquiry on illegal absence to prove facts therein stated.

2. Evidence before any C. M. or Court of Inquiry on illegal absence to prove that such and such statements were made before them, but no proof of the facts.

3. Record of a man's confession of desertion by his
A.A.72. C. O. to prove the making of such confession.

4. Letter from his former C. O. in reply to inquiry on the subject to prove facts therein stated.

5. Court Martial book or defaulter book to prove previous convictions, either civil or military, and defaulter book to prove instances of drunkenness.

6. The last quarterly pay list is evidence of being borne on the strength and in pay of a corps.

Certificate from the clerk of any civil court of the con-
A.A.164. viction and sentence, or acquittal by it of any person subject to military law is evidence of facts stated therein.

A copy of any of the above records, certified to be a true copy by the officer having the custody of such record, is evidence.

The original proceedings of a C. M. purporting to be signed by the President, and being in the custody of the J. A. G. or officer having the lawful custody thereof, are deemed to be of such a public nature as to be admissible in evidence on their mere production from custody. A.A.165.

Of course such proceedings will only prove that certain evidence was given or a certain statement made, and will not prove the facts of the evidence given. But the evidence given by a witness at a former trial may be read over to him in the presence of the court, and, if acknowledged by him on oath, may be entered in the proceedings. But in order to prove a charge of perjury committed before a C. M. it is not sufficient to merely produce the proceedings of the C. M. Evidence must be given, either by a member of the court or by some person who was present from personal knowledge, that the statement forming the subject of the charge of perjury was correctly recorded in the proceedings, or that the accused actually swore as stated in the charge. The evidence of more than one witness is also necessary to prove the falsehood of the statement which forms the charge.

As already mentioned, on one occasion when the proceedings of a C. M. were lost, the sentence was proved by the evidence of the president, corroborated by a memorandum made by the confirming officer.

The proceedings of a Court of Inquiry cannot, of course, be brought to prove the facts detailed in the statements recorded by it, but the proceedings may be adduced in evidence for such a purpose as to prove a discrepancy between a statement then made and the evidence given before the C. M., or where a man is tried for making a wilful false statement before such a court.

The meaning of the expression "purporting to be signed" (Act 89 Vic.) is that it makes it unnecessary to prove the seals or the writing or official character of the person who signs a document, and takes it for granted

it is properly signed unless the contrary can be shown. By the same Act a safeguard against forgery is made, as any document may be impounded in court on the application of either party with a view to proving it a forgery.

Parole evidence cannot be substituted for any evidence which the law requires in writing, unless it is first shown: 1st. That the document had no existence, or, 2nd. Account *why* and *how* it cannot be produced.

The producer of secondary documentary evidence must know it to be a *true copy*. Thus a prosecutor must have compared it with the original. If, say, the adjutant signs copy of the defaulter book, goes away and leaves another officer to prosecute, the latter's evidence is not admissible if he has not compared the extract with the original *himself*.

When secondary evidence is admissible, a copy of an original document is no evidence in itself, and only becomes so when verified by the oath of a witness. The prosecutor, when he produces a copy of former convictions, is put upon his oath which subjects him to cross-examination.

PROOF OF HANDWRITING.

Where an original letter is produced, the handwriting must be proved unless it be admitted by the opposite party.

If the handwriting be admitted and the original is produced, it must be so stated in the proceedings or deposed to in evidence.

The best evidence of the authenticity of a document is that of the writer.

The next, that of the persons who saw the writing done.

And then any who know the handwriting, having actually *seen* the person write, can depose to it. It is not sufficient to have merely had correspondence with him.

The comparison of a disputed writing with a writing proved to be genuine may be made to prove the genuineness or otherwise of the writing in dispute.

Experts in handwriting are admissible, but as a rule their evidence is only corroborative and is not considered in itself sufficient.

Copies must be attested in court by the person who made them, or subsequently examined them comparing them with the original, unless admitted to be true copies, which admission must be recorded in the proceedings. This does not apply to such certified copies which the law declares shall be admissible without further proof.

Although the original must, if possible, be produced before the court, a copy may be attached to the proceedings.

It frequently happens that handwriting is voluntarily admitted by the prisoner, the document may then be accepted as evidence, the admission being noted in the proceedings. If in the course of examining any witness it is desirable to question him about any letter or writing of his own, the witness on being shown the writing should first of all acknowledge it to be his in presence of the court.

II.—CONFESSIONS AND ADMISSIONS BY PRISONERS.

Voluntary Confessions of prisoners, whether made before apprehension or after, with reference to the charge to be made are admissible in evidence if satisfaciorily proved, and are the highest and most satisfactory proof, though not generally considered conclusive; and a confession is deemed voluntary unless proved to the contrary.

As we have seen, statements made by the prisoner to his legal adviser are privileged, but in England confessions made to a priest are not so.

A plea of "guilty" is confession in the fullest degree.

If any part of a confession is taken, the whole must be taken with equal weight; thus if a person own he owed a debt but also declares that he paid it, the confession cannot be taken to prove the debt without also proving that it was paid.

A confession made by a person when drunk is admissible, but the court would, of course, weigh it accordingly.

But any inducement of any kind, whether a threat, promise, or hope, of pardon held out or sanctioned *by any person in authority* will prevent the admission of such confession.

The circumstances detailed by a man who had turned Queen's evidence under hope or promise of pardon are not admissible as evidence against him inasmuch as they were not voluntary; but the confession of a person admitted as Queen's Evidence may be received against him if he refuse to give evidence on the trial of his confederates in crime.

The following are considered "persons in authority" over a prisoner:—

The prosecutor; the constable in charge of a prisoner; any authority over him, judicial or not, as the master or mistress in case of theft by a servant.

Any person apprehending another who is guilty of felony is a person in authority.

From this it is deduced that the commander of a guard or a sentry over a prisoner are persons in authority.

There is no objection whatever to such receiving a purely *voluntary* confession, but it is necessary for them first to warn the prisoner that what he says will be used in evidence against him; if they failed to do so it would not always invalidate the confession, though in some cases it has done so.

It is considered highly objectionable for a constable or any person in authority to interrogate a prisoner on a charge.

The inducement of a third person persuading a prisoner to confess in the presence of a person in authority renders it inadmissible; but if one prisoner urges another to confess in the hearing of a keeper such confession is admissible.

A confession obtained by artifice or deception is not in the same category and does not invalidate the confession. For instance, a prisoner is led to believe that all his accomplices are in custody, confesses, his confession holds good.

A prisoner gives a letter to the gaoler to post or endeavours to send it in any other way,—the letter is detained and is good in evidence against him.

A prisoner confesses to another who takes an oath not to reveal, breaks his oath, the confession holds good, for the law takes no notice of oaths irregularly administered.

A C. M. would probably reject such confessions because obtained by fraud, although it would be legal to accept them. Also, a C. M. would not accept admissions made by a prisoner against himself before a Court of Inquiry though it would be legal to do so; and even though the prosecutor might request such admissions to be received, the court would overrule him on the principle that they were made in a collateral matter, or on the broad rule that a C. M. *does not convict a man out of his own mouth.*

Admissions made by a witness at a trial may be used subsequently against him, for a witness may decline to answer any question tending to incriminate himself, yet if he does so he is responsible.

Admissions are usually confined to minor points, such as handwriting or dates; they must be recorded in the proceedings and do away with the necessity of evidence on the point.

Confessions of any kind are evidence against the party making them only and not against another, *e.g.*, they are not evidence against accomplices except in cases of conspiracy or mutiny where several persons have entered into the same design, and confession is made relating to acts for which all parties are responsible.

A confession is deemed voluntarily made unless disproved, for the prisoner is deemed at liberty to open his mouth or not.

Mode of producing a written Confession.—If it has been written or signed by the prisoner, or its truth acknowledged by him, it may be received and read to the court; but if taken down by a person and not signed by the prisoner it is not evidence, but can be used by the person who took it down as a memorandum to refresh his memory.

III.—DEPOSITIONS.

When any person whose evidence is material to the point in issue is unable to attend the court, the law allows depositions to be taken.

A deposition, duly taken on oath before a magistrate *in the presence of the accused* who shall have had an opportunity of cross-examining the deposer at the time, may be had in evidence at the trial of the accused before a civil court when it shall have been proved at the trial that the witness is either dead or kept away by the acts of the prisoner, or so ill as to be unable to attend, but under no other circumstances.

The application of this rule is very strict, a mere ordinary indisposition is not sufficient; it must be proved he is unable to be present by the surgeon in person, a medical certificate not being deemed sufficient.

If the inability to attend is not permanent, the Judge exercises his discretion whether to postpone the trial or accept the deposition.

When it appears to a Justice of the Peace a person is dangerously ill and not likely to recover, and that such person is able and willing to give material evidence with reference to an indictable offence, or relating to any person accused, such Justice may take down in writing the witness' deposition on oath, and such Justice shall sign it, record the reasons for taking the deposition, where taken, and the names of all persons present.

Reasonable *notice* must, however, be given to the person accused of the intention to take the deposition, so that

the accused may be present to refute the evidence thus taken. If in custody, he is to be brought for the purpose; if not, it is optional for him to attend. Then at the trial, if the witness is dead or too ill to attend the deposition may be read in court, and such depositions are the best and only evidence of what was said on the occasion.

Prisoners are entitled to copies of such depositions against them.

Thus, before any deposition can be received as evidence, proof must be given:—

(*a.*) That the deponent is dead or too ill to attend the court.

(*b.*) That the deposition was given on oath before a magistrate in the presence of the prisoner who had the opportunity of cross-examining the deponent.

(*c.*) That the deposition was signed by the deponent and by the magistrate.

Depositions are not, as a general rule, admissible before C. M. except on trials of criminal offences in default of a Civil Court. But there is nothing to prevent a court being adjourned and ordered to re-assemble in the hospital or room of a sick person who is unable to attend, and his evidence there taken.

IV.—DYING DECLARATIONS.

Dying declarations have already been referred to; when made, even if not in the presence of the prisoner and though contrary to general principles, they are admissible in evidence but only at trials for the murder or manslaughter of the person making the declaration, and under very restricted conditions, viz.:—

1st. When the subject of the charge is the death of the person making the declaration, and when the subject of the declaration relates to the circumstances of the death and to the party causing it.

2d. When such person really thinks himself beyond hope of recovery, and to be in the presence of death.

Such declaration is not invalidated if the man recovers or lingers, contrary to expectation.

It is not enough for the person to say he believes he will not recover, nor to express vague fears that he is about to die, but it must be shown that he really believed *in his own mind* that he had no hope of recovery.

The general principle on which such declarations are received is that they are declarations made *in extremis* when the party is at the point of death and when every hope in this world is gone, when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.

It often happens in cases of murder that the constable obtains a statement from the dying person as to the cause of his wounds, etc., and this is received in evidence if done in the proper way, as follows :—

My name is.....age.....place of abode .....and *believing myself dying*, I make the following statement :—

The expression of belief is the essence of the statement, and it only makes the statement evidence.

V.—EVIDENCE OF EXPERTS.

Where questions arise bearing on any point of science or art, the opinions upon that point of persons specially skilled in any such matter, or "experts," are relevant and so admissible.

Witnesses who depose *to the best of their belief or knowledge*,—as to handwriting or recognizing a certain person; or medical men as to the causes of death, or as to insanity; engineers, etc., on questions of their profession; ship-builders, as to the seaworthiness or otherwise of ships, etc.,—may be convicted for perjury for false evidence.

An expert who has no knowledge in the case in point only gives evidence in a general way, such as that in his

belief such and such a poison or injury would produce such and such effects on the human body, he cannot apply it to the case under consideration, this rests with the court.

WITNESSES.

The law of England admits as sufficient the testimony of *one* credible witness, except in cases of treason, perjury, misprision of treason, and speaking traitorous or disrespectful words against the Sovereign, when two are required. Two are required to prove perjury because, with only one witness, there would be one oath against another which would neutralize each other.

But in cases of perjury it is sufficient if *one* witness prove the perjury directly, while strong circumstantial evidence would be sufficient for the second.

If the defendant has sworn in one case contrary to what he has sworn in another, *one* evidence is sufficient to throw the balance over against the defendant.

In trials for treason two witnesses are required, except in cases of high treason in compassing or imagining the Sovereign's death, when the prisoner can be convicted on like evidence as in murder.

It is usual however on all trials by C. M. to have the testimony of two witnesses for the prosecution, though not always legally necessary. The evidence of the prosecutor alone is sufficient to obtain a conviction and the evidence of an accomplice even may suffice and conviction thereon be strictly legal; still it is only prudent that the charge should be confirmed by unimpeachable testimony in some material point.

The credibility of a single witness is of course liable to be impeached and would be judged from attendant circumstances. It is therefore only when, from the privacy of the offence, the possibility of further proof is excluded that the court would be satisfied with the evidence of a single witness.

The question is not by how many witnesses a fact may have been deposed to, but whether it has been proved

satisfactorily. A number of witnesses do by no means necessarily prove a fact, but the clear, full and impartial, evidence of one witness free from all suspicion or bias is worth more than that of a crowd all making the same assertions, yet none of them worthy of belief.

Formerly all interested witnesses were refused, but now, since Lord Denman's Act, 843, the law would seem in favour of accepting the testimony of all witnesses, leaving it for the court to estimate the value of the testimony. Objections may however be raised to the "competency" or to the "credibility" of witnesses.

COMPETENCY AND CREDIBILITY OF WITNESSES.

Witnesses are competent notwithstanding they have an interest in the case, or have been convicted of a criminal offence not bearing on the subject under trial.

A prosecutor, though he may have himself originated the charges or may, in any other way, be personally interested in the result, is a competent witness.

Deaf and dumb may now give evidence in writing or through a sworn interpreter.

Questions as to *incompetency* refer to witnesses being unable to give evidence at all, consequently, the objections should be stated before the witness is sworn, but an objection may be raised at any stage. On the other hand, objections to the *credibility* of witnesses should be reserved for the defence or the reply of the prosecutor, and they cannot be raised till after the witness is examined.

The credibility of witnesses is usually tested indirectly by cross-examination, or directly by evidence of general bad character; such as that he is not to be believed on oath having been convicted of perjury.

With regard to this latter point the law is that no person is incapacitated from giving evidence by reason of crime, though in some cases the testimony given cannot but be received with caution where the crime itself would especially affect the credibility of the witness.

In addition to evidence as to bad character the credibility of a witness may also be impeached in cross-examination by making him contradict himself as to his own evidence, and by proving statements made by the witness out of court provided they were material to the point in issue.

The party whose witnesses are impeached may bring evidence to re-establish their credit, or to attack the credit of the impeaching witnesses.

The following are some cases of incompetency laid down by law :—

1. Want of reason or understanding; this includes lunacy, disease, loss of memory, immaturity of intellect.

In lucid intervals persons of disordered intellect are competent witnesses provided there has been no serious fit of insanity between the time of the occurrence and the date of trial.

The admissibility of a child to give evidence is regulated, not by his years, but by the development of his mental faculties, by his religious knowledge, and by the sense he may entertain of an oath, subject to which a child of any age may be examined as a witness and is sworn like any other witness.

The law assumes that every child of fourteen is capable of giving evidence but, at the discretion of the judge or court, much younger children are admitted. "A child must be able to understand the obligation to speak the truth." Children of five years of age have given evidence.

If a child is rejected no hearsay on the part of the child can be given by another person. The court may ask the child questions to ascertain the development of its mental faculties, its religious knowledge, etc.

2. Husband and wife for or against one another in any criminal proceeding where one of them may be party, except in cases of personal injury of either by the other; but the evidence of either for or against another person is received, even though such evidence is liable to incriminate the husband or wife. Of course the court must judge

of the trustworthiness of such evidence. *All* other relationships are exempted from this rule.

The Act however makes a special exception to this
A.A.156.(3) rule in the case of civilians purchasing from soldiers—arms, clothing, stores, etc., and provides that a husband or wife may be an ordinary witness.

3. No prisoner on his trial is competent to give evidence for or against himself.

4. Prisoners jointly arraigned are incompetent witnesses for or against one another, unless any one of them pleads guilty or unless there is a separate finding. As seen previously, if a prisoner desires the testimony of another involved in the same charge, he should apply for a separate trial.

In the case of several prisoners being tried separately for the same offence, any one not on his trial is a competent witness for, but not against the others; but when his own trial is over he may be called by the prosecution as anything he said while under trial would not injure him. Evidence of accomplices, and of principal against accessory, as a thief against receiver, is admissible, but must be received with great caution and is generally considered to need confirmation.

When persons are jointly arraigned and there is no prospect of obtaining other evidence one man implicated may receive a separate verdict of acquittal, and then he can become a witness against the rest. This turning "*King's*" or "*Queen's Evidence*" is often brought about by promises of reward, etc. Or if during the trial the court find no evidence against one of the prisoners, they may acquit him and then call him as a witness.

In C. M. the usual course would be not for the court to give a verdict of acquittal but for the convening officer to dispense with the trial of any one of the accomplices, who can then become a witness.

When a man awaiting trial on the same charge is called by the prisoner in his defence, he would not be cross-examined so as not to prejudice his own trial, and he

need not reply to any question which would criminate himself.

Want of religious belief does not, in England since 1869, render a witness incompetent, as it is ruled that a witness must be sworn in that form which he feels binding on his conscience. Such a witness makes a declaration, and if he depose falsely he can be prosecuted for perjury. A recognized form is, "I ..... do solemnly promise and declare that the evidence which I shall give before this court shall be the truth, the whole truth, and nothing but the truth,"—and if he gives false evidence he may be indicted for perjury as if he had taken an oath. A witness may be asked, after being sworn, whether he considers the oath binding; if he answers in the affirmative it is sufficient. R.P.80.

Protestants are sworn on the Bible, Roman Catholics on the Crucifix, or on a cross marked on the cover of the Bible; Mahomedans on the Koran, either kissing it or putting it on their heads; Jews on the Pentateuch. Jews regard no oath as binding unless they have a hat on whilst being sworn.

An oath may be administered to the witness by a minister of his own religion if the prejudices of the witness render it desirable.

A Chinaman was once asked what form of oath would be binding on him? He asked for a china saucer, this he broke in pieces, exclaiming that his soul would be cracked like the saucer if he did not speak the truth. This oath was of course accepted.

CHAPTER XVI.

MILITARY LAW AS IT CONCERNS THE MILITIA OF CANADA.

M.D.A.1. The supreme command of the Naval and Military Forces of Canada is vested in the Queen, and "shall be exercised and administered by Her Majesty personally or by the Governor as Her Representative."

The Militia of Canada are governed by the "Dominion Militia and Defence Act"* and by Militia Regulations and General Orders issued in pursuance of that Act.

The following are the principal provisions of the M. D. A. in so far as it relates to the special laws and penalties to which the Militia are subject:—

M.D.A. 64. The Active Militia of Canada are subject to the Queen's Regulations and Orders for the Army at all times;—and every officer and man is also subject to the Army Act, and to all other laws applicable to Her Majesty's troops in Canada and not inconsistent with the "Dominion Militia and Defence Act,"—when on actual service, during annual drill or training, also during any drill or parade of his corps at which he may be present in the ranks or as a spectator, and also when in uniform; except that no man is liable to suffer any other corporal punishment than death or imprisonment for any contravention of such

*The letters M. D. A. in this Chapter stand for the "Dominion Militia and Defence Act."

laws;—and Her Majesty may direct that any provisions of these laws or regulations shall not apply to the Militia Force.

Every officer, N. C. officer or man of the Active Militia is liable to be tried by Court Martial for any offence committed while serving in the militia *within six months* after his discharge therefrom, or after his corps is relieved from actual service,—but for the crime of desertion he may be tried at any time without reference to the length of time which may have elapsed since his desertion. (See also Section 86.)

Any militiaman who, when called out for actual service, absents himself without leave from his corps for a longer period than 7 days may be tried by a Militia Court Martial as a deserter. M.D.A.67.

Her Majesty may convene Courts of Inquiry and appoint officers of the Militia to constitute such Courts for the purpose of investigating and reporting on any matter connected with the government or discipline of the Militia, and with the conduct of any officer, N. C. officer or private of the force; and Her Majesty has power at any time to convene Militia Courts Martial and to delegate power to convene such Courts, and to appoint officers to constitute the same, for the purpose of trying any officer, N. C. officer or private of the Militia for any offence under the Militia Act, and also to delegate power to approve. confirm, mitigate or remit any sentence of any such Court; but no officer of Her Majesty's Regular Army on full pay can sit on any Militia Court Martial. M.D A.72.

The regulations for the composition of Militia Courts of Inquiry and Courts Martial, and the modes of procedure and powers thereof, are to be the same as those at the time in force in the Regular Army, provided they are not inconsistent with the Militia and Defence Act. M.D.A.73.

No Militia officer or Militiaman can be sentenced to death by any Court Martial, except for mutiny, desertion to the enemy, or traitorously delivering up to the enemy any garrison, fortress, post or guard, or traitorous corres- M.D.A.74.

pondence with the enemy; and no sentence of any General Court Martial can be carried into effect until approved by Her Majesty.

M.D.A. 69-71. The Militia Act empowers the Governor in Council to make regulations for the billeting and cantonment of troops and militia when on active service, for the furnishing of carriages, horses, and other conveyance, such as railway cars, engines, boats, etc., for their transport and use, and to punish any neglect or refusal to furnish the same.

M.D.A.75. Any officer commanding a corps of Militia who shall knowingly claim pay, on account of any drills performed with his corps, for any man belonging to any other Corps of Militia, or who shall include in any parade state or other return any man not duly enrolled and attested as a militiaman, shall be guilty of a misdemeanor, and shall likewise be liable to be tried and punished by Court Martial; and any N. C. officer or private of the Militia who may claim or receive pay on account of any drill performed in the ranks of any other than his own proper corps, shall be guilty of a misdemeanor, and be liable to be tried and punished by Court Martial.

M.D.A.76. Any officer or N. C. officer of the Militia who obtains under false pretences, or who retains or keeps in his own possession with intent to apply to his own use or benefit, any of the pay or moneys belonging to any officer, N. C. officer or private of any Corps, shall be guilty of a misdemeanor, and shall be dismissed the service; and any officer or N. C. officer who may sign a false parade state, roll, or pay-list, or any false return whatever, shall be guilty of a misdemeanor, and be liable to be tried by Court Martial; and any person making an affidavit or declaration required by the M. D. A., or by any regulation made under the authority thereof, and swearing or declaring falsely therein, shall be guilty of perjury.

M.D.A.77. Any person refusing to give information required by any Officer or N. C. Officer making a Militia Roll in order to enable him to comply with the provisions of the M. D. A., or who gives false information, "shall forfeit

and pay a penalty not exceeding $20" for each item of information required of him or falsely given.

And any Officer or N. C. Officer of the Militia refusing or neglecting to make any enrolment or ballot, or any roll or return required, shall incur a penalty, if an officer not exceeding $50, if a N. C. O. not exceeding $25.

Any militiaman, drafted or liable to be drafted for service, who shall refuse or neglect to take the necessary oath of allegiance (viz.: "I, *A. B.*, do sincerely promise and swear that I will be faithful and bear true allegiance to Her Majesty.") when tendered to him by a Justice of the Peace or by any commissioned officer in command of the Corps to which such militiaman belongs or in whose district he resides, shall be subject to imprisonment not exceeding 6 months, and for every subsequent neglect or refusal to take such oath shall be subject to a further imprisonment not exceeding 12 months; and he may, on due proof in either case, be summarily committed upon the warrant of any two Justices of the Peace. M.D.A.78.

Any officer, N. C. officer, private, or any person whatsoever, who falsely personates another at any parade of the Militia or on any other occasion, is liable to a fine not exceeding $100 and shall be guilty of a misdemeanor; and any officer or N. C. officer of the Militia refusing or neglecting to assist his C. O. in making any roll or return, or refusing or neglecting to obtain any required information in order to make a correct return, shall incur a penalty, if an officer not exceeding $50, if a N. C. O. $25; and any person refusing to give information for them shall incur a penalty of $10 for each offence. M.D.A.79.

Any officer, N. C. O., or private who, without lawful excuse, neglects or refuses to attend any parade, drill or training at the appointed place and hour, or who refuses or neglects to obey any lawful order at such time, shall incur a penalty, if an officer of $10, if a N. C. O. or private of $5 for each offence; and absence for each day is held to be a separate offence; and any person who interrupts or hinders any Militia at drill, or trespasses on M.D.A.80

the bounds set by the proper officer, shall incur a penalty of $5 for each offence, and may be taken into custody and detained by order of the C. O. until such drill is over for the day; and any officer, N. C. O., or private, for insolent or disorderly behaviour to, or for disobeying the lawful command of, his superior officer, shall incur a penalty, if an officer of $20, if a N. C. O. or private of $10 for each offence.

M.D.A.81. Any N. C. O. or private who fails to keep in proper order any arms or accoutrements delivered or entrusted to him, or who appears on any occasion with his arms or accoutrements out of proper order, or unserviceable, or deficient in any respect, shall incur a penalty of $4 for each offence; and any person who unlawfully disposes of or removes any arms or other articles belonging to the Crown, or who refuses to deliver up the same when lawfully required, etc., shall incur a penalty of $20 for each offence; but the offender may instead be indicted and punished for a greater offence, and may be arrested by order of a Magistrate.

M.D.A.82. Any officer, N. C. O. or private who, when his corps is lawfully called upon to act in aid of the civil power, refuses or neglects to go out with such corps or to obey any lawful command of his superior officer, shall incur a penalty, if an officer not exceeding $40, if a N. C. O. or private not exceeding $20 for each offence.

M.D.A.83. Any person who resists any draft of men enrolled under the M. D. A., or counsels or aids any person to do so,—or counsels any drafted man not to appear at the place of rendezvous, or wilfully dissuades him from the performance of any duty, shall, upon conviction thereof, be subject to a fine not exceeding $100, or to imprisonment not exceeding 6 months, or to both.

M.D.A.84. Any person who wilfully contravenes any enactment of the M. D. A. for which no special penalty is imposed, shall incur a penalty not exceeding $20 for each offence; but this does not prevent his being indicted and punished for any greater offence.

M.D.A 85. All penalties incurred under the M. D. A. are recover-

able with costs by summary conviction on the evidence of one credible witness, on complaint or information before one Justice of the Peace; and in case of immediate non-payment, the Judge may convict him to prison for a period of not more than 40 days when the penalty does not exceed $20, and for not more than 60 days when it exceeds the last mentioned sum.

No prosecution against an officer for any penalty under the M. D. A. or under any regulation made under the authority thereof, shall be brought except on the complaint of the Officer Commanding the Militia, or officer of the Militia authorized by him; and no such prosecution against any N. C. O. or private shall be brought except on the complaint of the C. O. or Adjutant of his battalion or corps, or Captain of his company or corps, or other officer duly authorized; and no such prosecution shall be commenced after the expiration of *six months* from the commission of the offence charged unless it be for unlawfully buying, selling, or having in possession, arms, accoutrements, or other articles delivered to the Militia, or for desertion. M.D.A.86.

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